(1)

No. 95-668-CFX
Status: GRANTED

Title: Auciello Iron Works, Inc., Petitioner
v.
National Labor Relations Board

Docketed:
October 24, 1995

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: O'Reilly III,John D.

Counsel for respondent: Solicitor General

Ptn due & mld 10-19-95, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Oct 19 1995	G	Petition for writ of certiorari filed. (Response due December 26, 1995)
3	Nov 14 1995		Order extending time to file response to petition until December 26, 1995.
4	Dec 21 1995		Brief of respondent National Labor Relations Board in opposition filed.
5	Jan 3 1996		DISTRIBUTED. January 19, 1996 (Page 2)
6	Jan 19 1996		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 1, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 29, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.
			**********
8	Feb 15 1996		Record filed.
		*	Original record proceedings National Labor Relations Board (BOX).
7	Feb 16 1996		SET FOR ARGUMENT MONDAY, APRIL 22, 1996. (2ND CASE).
9	Mar 1 1996		Joint appendix filed.
10	Mar 1 1996		Brief of petitioner Auciello Iron works filed.
11	Mar 8 1996		CIRCULATED.
12	Mar 25 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the First Circuit (BOX).
13	Mar 29 1996	X	Brief of respondent National Labor Relations Board filed.
14	Mar 29 1996	X	Brief amicus curiae of AFL-CIO filed.
15	Apr 22 1996		ARGUED.

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Supreme Court, U.S.
FILED
OCT 19 1995
OFFICE OF THE CLERK

(1)

No. 95-668

In The

Supreme Court of the United States

October Term, 1995

AUCIELLO IRON WORKS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an Employer is bound by a Union's "acceptance" of an earlier Employer proposal for a collective bargaining agreement when, at the time of the Union's "acceptance", the Employer had a reasonable basis for a good faith doubt of the Union's continued majority status, and expressed that doubt within a reasonable period of time after being advised of the final erosion of Employee support for the Union, but less than one day after the Union had telegraphed its "acceptance".

PARTIES TO THE PROCEEDINGS

National Labor Relations Board

Auciello Iron Works, Inc.

In accordance with Rule 29.6; Auciello Iron Works, Inc. hereby discloses that it has no parent, affiliates or subsidaries.

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2. The decision of the First Circuit Court of Appeals below is also inconsistent with the decision of the Court of Appeals for the Eleventh Circuit in *NLRB v. Bickerstaff Clay Products, 871 F.2d 980 (11th Cir. 1989)* determining that, under facts identical to those involved in this case, an Employer may reject a Union's "acceptance" of an Employer's earlier offer when the Employer has reason to believe that, at the time of the "acceptance", the Union no longer represented a majority of its employees 10

3. The decision of the First Circuit Court of Appeals below is inconsistent with the rationale of this Court in *NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990)* where, notwithstanding the Union's "acceptance" of the Employer's earlier offer, the decision solely considered whether the Employer's rejection of that "acceptance" was based on the Employer's having an actual and reasonable good faith doubt as to the Union's continued majority status as of the date of the Union's "acceptance". If the decision of the First Court were correct, the existence of the Employer's good faith doubt would have been immaterial in view of the Union's having "accepted" the Employer's earlier offer prior to the Employer's having challenged the Union's majority status. 10

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

AUCIELLO IRON WORKS, INC., Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, Auciello Iron Works, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on July 21, 1995.

OPINIONS BELOW

The opinion and judgment of the First Circuit Court of Appeals, dated July 21, 1995 is reported at 60 F.3d 24. A copy of the opinion is reproduced in the Appendix at p. 1a. A copy of the Supplemental Decision and Order of the National Labor Relations Board dated May 9, 1995 is reported at 317 NLRB No. 60 and is reproduced in the Appendix at p. 9a. The earlier decision of the First Circuit Court of Appeals dated November 30, 1992 is reported at 980 F.2d 804, and is reproduced in the Appendix at p. 59a. The original decision and order of the National Labor Relations Board, incorporating by reference the original decision of the Administrative Law Judge of November 24, 1989 is reported at 303 NLRB No. 90 and is reproduced in the Appendix at p. 84a.

JURISDICTIONAL STATEMENT

On July 21, 1995, the First Circuit Court of Appeals entered judgment and opinion enforcing the Supplemental Decision and Order of the National Labor Relations Board dated May 9, 1995.

The jurisdiction of this Court to review the decision of the First Circuit Court of Appeals is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

29 U.S.C. Sec. 158(a)(1) and (5)

These provisions are reproduced, verbatim, in the Appendix to this Petition commencing at p. 1-a.

STATEMENT OF THE CASE

The Employer maintains an iron works fabrication shop located in Hudson, Massachusetts, and had enjoyed an amicable collective bargaining relationship with Local 501 of the Iron Workers' Union for a number of years. A series of collective bargaining agreements had been negotiated without incident over those years. After several negotiating sessions in 1988, the parties reached a tentative agreement with the Employer agreeing to the Union proposal for the economic terms of a wage increase. This agreement was brought back to the Union membership for employee ratification, and was rejected by the Union membership.

After unsuccessful efforts by the bargaining committees to refine the settlement package, a strike vote was taken by the Union membership and a strike commenced on October 14, 1988, with picket lines being placed at the Employer's plant. Some five weeks into the course of the strike and the picketing activity, a gradual erosion of employee support for the Union was evidenced, so that by the final week of the strike, the Employer noticed an increased deterioration of Union support. The factual basis upon which the Employer relied for its growing belief that the Union might no longer maintain a majority status was the fact that many of the employees had elected to cross the picket line, and/or had resigned from the Union and, more importantly, had made direct comments to upper management supervisory employees, affirmatively reflecting the bargaining unit employees' lack of support for the Union. As a result of the Employer's feeling that the support for the Union was on the down slide, the Employer, at the last negotiating session between the parties on November 17, 1988, advanced a proposal which

incorporated by reference the earlier points on which agreement had been reached, but took a harder line on other points. The Union then called off further negotiations, and immediately the Employer observed factors that supported their earlier impression that the Union support was deteriorating.

The picket line was withdrawn the next day, Friday, November 18, 1988, and the following week, the balance of the employees returned to work and continued to make strong comments to management representatives indicating their lack of any continuing support for the Union. Also during that week of November 21, a number of additional employees withdrew from Union membership. While the Employer was in the process of reviewing what, if any, actions would be appropriate in view of this final erosion of employee support for the Union, the Union sent a Sunday evening telegram to the home of the company president, purporting to "accept" the management offer which had been made prior to: (a) the withdrawal of the picket line; (b) the return to work of employees; (c) the withdrawal of Union membership by additional employees; and (d) the increased expressions of dissatisfaction with the Union being made by employees. Management representatives met with their attorneys the following Monday morning, November 28, 1988, and reviewed the Employer's revised assessment as to the now complete lack of employee support for the Union, and immediately advised the Union that it would no longer recognize the Union as the exclusive bargaining representative of the employees, and in view of the Union's clear lack of support among employees, its prior contract proposal was no longer available for "acceptance".

Based on an Unfair Labor Practice Charge filed with the Regional Office of the National Labor Relations Board alleging a statutory refusal to bargain by the Employer's refusal to consider itself bound by the Union's "acceptance" of the earlier management proposal, the Regional Office of the Board issued a Complaint on January 17, 1989, alleging the Employer violated the Act by withdrawing recognition from the Union and by refusing to execute an agreement with the Union.

Hearings were conducted before Administrative Law Judge Zankel on June 21, August 8 and August 9, 1989, and on November 24, 1989, the Administrative Law Judge issued a decision that the issue of the Employer's good faith doubt of the majority status of the Union was, in fact, immaterial, as the Union had "accepted" the Employer's proposal immediately prior to the Employer's withdrawal of recognition. The Administrative Law Judge determined that a collective bargaining agreement between the Employer and the Union came into existence upon the Union's transmittal of its Sunday evening, November 27, 1988, telegram purporting to "accept" the Employer's last proposal, and that the Employer's withdrawal the following day of recognition and refusal to execute an agreement was, therefore, unlawful.

Approximately a year and a half later, June 27, 1991, the National Labor Relations Board issued a three-paragraph order, affirming the Administrative Law Judge (Appendix, p. 84a). In connection with the NLRB attempting to seek enforcement of that Order in the United States Court of Appeals for the First Circuit, the Court affirmed a number of aspects of the NLRB Order, but agreed with the Employer that the NLRB decision which had merely cited prior NLRB determinations dealing with

instances where the Union's lack of support occurred only **after** the making of the agreement, and were, therefore, not a basis for determining a factual situation involving the Union's lack of support which existed **at the time** of the Union's efforts to "accept" the Employer's earlier proposal. The Court determined that the Board had "glossed over" what the Court determined to be the "tough question" presented in this case, namely whether a contract must be irrebuttably presumed where the Union effort to accept an earlier Employer proposal came at a time when the Union clearly lacked majority support. The First Circuit noted a then-recent decision of the Seventh Circuit Court of Appeals determining that an earlier management proposal was no longer available for "acceptance" by a Union which had clearly lost its majority support of the workers. *Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992).*

The First Circuit Court of Appeals further noted that in recent decisions, both before this Court as well as before the Eleventh Circuit, the Courts had become involved in the issue of whether the Employer had, in fact, a good faith doubt of the continued Union's majority in cases factually identical to the instant case, namely, when that good faith doubt was first raised by the Employer only immediately after the minority Union had attempted to "accept" an earlier management proposal. The matter was remanded by the First Circuit to the NLRB to address the apparent inapplicability of the prior Board precedent cited in its June 27, 1991 decision, as well as to address the apparent inconsistencies in the approach taken in prior matters, both with this Court as well as with the Eleventh Circuit, and to address the impact of the Seventh Circuit Court of Appeals decision in *Chicago Tribune, supra,* that an Employer's offer is no longer available to the Union

whose majority support has been clearly eroded subsequent to the tendering of the earlier management proposal. The Board was specifically directed by the First Circuit to "act with expedition" and to forward a copy of its Supplemental Decision to the Clerk of the First Circuit "as soon as it can".

Two and one-half years later, the Board issued its Supplemental Decision and Award wherein it determined that, for policy considerations of "industrial stability" and "employee freedom of choice", the presumption of majority status must prevail until the Employer expressly challenges that majority status. It further determined that, if an Employer has a good faith doubt as to the Union's continued majority status, it must initially raise that issue **before** the Union accepts its offer. In the factual context of this case, the Board's decision, in essence, stated that the fact that the Union moved quicker than the Employer by sending a Sunday evening telegram to the home of the company's president before the management's announcement of withdrawal of Union recognition, in the face of complete and obvious erosion of **any** Union support on the following day, a Monday morning, was dispositive of the case.

The matter was again reviewed by the United States Court of Appeals for the First Circuit on July 21, 1995 and it was determined that, in view of the Board's finally having announced an articulated policy-oriented basis for its determination, the Court would affirm that ruling. The Court specifically noted that, in adopting the Board's rule that an Employer may not raise the issue of the Union's majority status once the Union has "accepted" an earlier management proposal (even though the Employer attempts to raise this issue within a day or, in theory, within an hour

after the Union's "acceptance") that the Board was reaching "a result different from that by our sister circuit in *Chicago Tribune Co.*" (Appendix p. 7a).

REASONS FOR GRANTING THE WRIT

1. The decision of the First Circuit Court of Appeals below was acknowledged by that Court to be directly contrary to the decision of the Court of Appeals for the Seventh Circuit in *Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992).*

2. The decision of the First Circuit Court of Appeals below is also inconsistent with the decision of the Court of Appeals for the Eleventh Circuit in *NLRB v. Bickerstaff Clay Products, 871 F.2d 980 (11th Cir. 1989)* determining that, under facts identical to those involved in this case, an Employer may reject a Union's "acceptance" of an Employer's earlier offer when the Employer has reason to believe that, at the time of the "acceptance", the Union no longer represented a majority of its employees.

3. The decision of the First Circuit Court of Appeals below is inconsistent with the rationale of this Court in *NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990)* where, notwithstanding the Union's "acceptance" of the Employer's earlier offer, the decision solely considered whether the Employer's rejection of that "acceptance" was based on the Employer's having an actual and reasonable good faith doubt as to the Union's continued majority status as of the date of the Union's "acceptance". If the decision of the First Court were correct, the existence of the Employer's good faith doubt would have been immaterial in view of the Union's having "accepted" the Employer's earlier offer prior to the Employer's having challenged the Union's majority status.

The factual situation involved in this case is a recurring one, wherein during the course of a prolonged

strike, the parties continue to negotiate and, when the gradually eroding employee support for the Union reaches a low ebb, the Union is generally inclined to grab "whatever it can" by attempting to "accept" the most recent Employer proposal, even though that Employer proposal was likely made by the Employer at a time when either: (1) the Union's support among bargaining unit employees was greater; or (2) the employer may not have been fully aware of the extent of the Union's lack of employee support. Where, as in this case, the Union's "acceptance" of the earlier Employer offer literally comes out of the blue and is sent in such apparent panic circumstances by being telegraphed on a Sunday evening to the home of the company's president only a few days after the final indicia of any employee support for the Union has vanished, the Employer is thus placed in a position where it must make a rapid assessment and determination of whether, at the time of the Union's effort to capture the benefit of a prior Employer proposal, the Union was, in fact, a representative of a majority of the bargaining unit employees. Prior decisions of other Circuit Courts of Appeals as well as the decision of this Court in *NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990)* have determined that the critical issue in such circumstances, where the Employer, after receiving such a Union attempt to "accept" a prior offer in the face of eroding employee support, is whether the Employer may reject in a timely fashion such an "acceptance" based on the Employer's good faith belief that the Union, at the time of its "acceptance", no longer possessed the support of a majority of the bargaining unit employees. Unlike the decision in this Court in *Curtin Matheson Scientific* and unlike the Seventh Circuit Court of Appeals' decision in *Chicago Tribune*, and unlike the Eleventh Circuit Court of Appeals' decision in *NLRB v. Bickerstaff Clay Prods. Co., infra*, the First Circuit Court of

Appeals determined that the question of the Employer's good faith doubt of the Union's majority status at the time of receiving such a telegram "acceptance" is immaterial, as the agreement is fully consummated by the Employer's receipt of the Union's "acceptance" and that "agreement" constitutes an irrebuttable presumption of the Union's majority status. Thus, the decision of the First Circuit Court of Appeals in this case is inconsistent with at least two other Circuits, as well as with the rationale of this Court.

In *NLRB v. Bickerstaff Clay Prods. Co., 871 F.2d 980 (11th Cir. 1989)*, cert. den. 493 U.S. 924 (1989), the Employer's last offer of November 6 was not accepted but, after further deterioration of the Union's majority status, was "accepted" by the Union on April 8th. As in the instant case, one day after receiving this "acceptance", management withdrew recognition from the Union and advised the Union that the prior offer was no longer available for "acceptance." While, unlike the instant case, both the Administrative Law Judge and the National Labor Relations Board decided the matter on the question of whether this subsequent expression by the Employer of its doubt of the Union's majority status was, in fact, based upon a good faith doubt, based on objective considerations (a matter which, in this case, the Board and First Circuit are now saying is immaterial, in view of the Union's having sent its "acceptance" one day prior to the Employer's withdrawal of recognition), the Board did argue before the Eleventh Circuit Court of Appeals, as it did in the instant case, that the prior offer of the Employer remained available for "acceptance", notwithstanding the Employer having reasonably concluded in the meantime that the Union no longer represented a majority of the bargaining unit employees. According to the Board's argument in that

case, the Employer's offer would be available for such "acceptance" until such time as the Employer expressly either withdrew the offer or withdrew recognition. The Eleventh Circuit Court of Appeals, unlike the First Circuit Court of Appeals in the instant case, determined that there was no such obligation to either withdraw the offer or withdraw recognition.

> "There is no authority cited by the Board, and none exists, for the proposition that withdrawal of a prior offer is a condition precedent to an employer's withdrawal of recognition based on a good faith doubt of the Union's majority status. If the circumstances changed such that the Employer reasonably believed that the Union no longer represented a majority of its employees on April 8, 1986, Bickerstaff had no duty to withdraw its offer by notifying the Union." *NLRB v. Bickerstaff Clay Products, 871 F.2d 980, 993-994 (11th Cir. 1989)*

The Court of Appeals in that case went on to determine that the Employer was within its rights in rejecting the Union's telegram "accepting" the Employer's prior offer and in withdrawing recognition from the Union, even though this was not done, as in the instant case, until one day after the Union had "accepted" the Employer's prior offer. This decision is, thus, clearly inconsistent with the First Circuit's decision in this case that, notwithstanding an Employer's legitimate, good faith doubt of the continuing majority status of the Union, it is bound by a Union "acceptance" of the Employer's most recent proposal.

Similarly, in *Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992)*, the Employer had engaged in a number of collective bargaining sessions with the Union and, after becoming aware of the nearly complete erosion of the Union's support among employees, had not specifically withdrawn its earlier offers to the Union. It was only several days after the Union's eventual "acceptance" of the Employer's earlier offer that the Employer, for the first time, formally took the position that at the time of the Union's "acceptance", it no longer represented a majority of the employees. As in the instant case, the National Labor Relations Board took the position that the acceptance of the Employer's earlier offer bound the Employer to a collective bargaining agreement, and it was too late for the Employer to maintain that, at the time of that "acceptance", the Union no longer represented a majority of the employees. That position was rejected by the Seventh Circuit Court of Appeals on the basic rationale that an Employer may not legally consummate an agreement with a Union when, at the time of that consummation, the Employer has reason to believe that the Union does not represent a majority of its employees. The Seventh Circuit Court of Appeals also placed great emphasis on the fact that to allow a Union to suddenly grasp an earlier Employer offer at a time when the Union's support has disappeared and, simply because the Employer has not formally withdrawn either the offer or its recognition of the Union, to force its employees to be bound by a collective bargaining agreement with a Union with whom they no longer have any allegiance is unduly and unnecessarily penalizing those employees. The Court drew careful distinctions between situations such as those involved in this case where, in the absence of any bad faith bargaining by the Employer, the Employer simply had not formally withdrawn its prior offer or Union recognition in

the face of the Union's eroding support and cases where the Employer refuses to comply with its statutory obligation to bargain in good faith and, as the result of such refusal, the employee support eventually erodes. The Court suggested that in the latter case, the Employer would not be in a position to reject the Union's acceptance of any Employer offer, as the Employer itself has illegally contributed to the erosion of the Union's support. There is no suggestion that any such circumstances existed in the instant case. The Court of Appeals for the First Circuit in the instant case expressly acknowledged that its determination would be contrary to this decision of the Seventh Circuit Court of Appeals in Chicago Tribune. (Appendix p. 7a)

The facts of the instant case are also remarkably similar to those involved in *Curtin Matheson Scientific v. NLRB, 859 F.2d 362 (5th Cir. 1988) rev'd. 499 U.S. 777 (1990)*. In that case, the Employer had made an offer to the Union on June 12th, and after serious erosion of Union support, the Union finally "accepted" the offer on July 16th. Four days later, the Employer declined the Union's "acceptance" and, for the first time, formally announced its withdrawal of that earlier offer, based on its doubts as to the Union's majority status as of the date the Union purported to "accept" the Employer's offer. The Fifth Circuit Court of Appeals determined that on those facts, there was no violation of Sections 8(a)(1) and 8(a)(5) by the Employer refusing to execute an agreement, and by withdrawing its recognition of the Union. Most significantly, unlike the Court of Appeals in the instant case, it did not consider a legitimate agreement to have been entered into simply by the Union's attempting to "accept" the Employer's last proposal. Obviously, if the Fifth Circuit had felt that the mere "acceptance" by the Union of the earlier Employer offer constituted an

agreement, there would have been no need for the Court of Appeals even to have considered the legitimacy of the Employer's claim, made four days after this "acceptance" as to the Union's lack of majority status.

On appeal, a majority of this Court determined that the Employer's asserted basis for its contention that the Union no longer maintained a majority status (the existence of a number of striker replacements which the Employer had assumed did not support the Union) was not a legitimate basis for the Employer's withdrawal of recognition. But, under the rationale of the First Circuit in the instant case, there would have been no need to have even reached that issue if the Union's "acceptance" of the Employer's earlier offer constituted a binding agreement, regardless of the Employer's feeling that the Union then no longer enjoyed a majority status.

Similarly, the extended dissenting opinions of four members of this Court determining that the Employer had not violated the statute by refusing to execute an agreement with the Union necessarily assumed that a binding contract was not consummated simply by the Union's "acceptance" of the Employer's earlier offer.

It is certainly a giant step for the Board, in this case, to expand the rule whereby an Employer is prevented from contesting a Union's majority status **during the term of an agreement** to the point the Employer is also prevented from questioning the **very existence and validity of that same agreement as having been consummated at a time when the Union lacked a majority status**. As the Seventh Circuit Court of Appeals noted in *Chicago Tribune Co.*, it is a classic bootstrap argument to maintain that the legality of the alleged consummation of an agreement

creating an irrebuttable presumption of the Union's majority status may not be attacked by a claim of the Union's lack of majority status at the time of the alleged consumption of that agreement.

In the instant case, the full implications of the Union's true lack of support were not highlighted until the picket line was withdrawn on Friday, November 18, 1988 and, during the course of the following week, when employees returned to work and resigned from the Union, and also continued to express a strong lack of support for the Union. It would indeed be a gross disregard for the rights of these various employees who had now clearly indicated their lack of support for the Union for the principle of law to be applied that, as soon as this lack of support finally became apparent, both to the Union and to the Employer, the fact that the Union won the race to the telegraph office by sending a telegram to the home of the company's president on Sunday evening, November 27th, the employees now have to be governed by a three-year contract "accepted" by a Union with which the employees clearly want no affiliation.

There could well be circumstances where an Employer involved in a factual situation identical to that in this case has improperly elected not to raise the majority status issue until some time in the distant future, so as to rid itself of what turned out to be an onerous Union agreement. That is not the situation in this case, as the Employer not only had not engaged in any collective bargaining sessions with the Union after the Union's picketing and striking had terminated, and other indications of employee non-support of the Union had been brought to the attention of the Employer, but it also **immediately** had disclaimed any obligation to deal further with the Union.

The Employer in this case certainly raised the issue within a reasonable time after becoming fully aware of the complete extent of the Employees' dissatisfaction with their Union and no bargaining sessions had been held in that time. Thus, to the extent the rationale of the Board is to the effect that an Employer may not have it both ways in becoming aware of the lack of the Union majority status and still, hopefully, attempting to negotiate a favorable agreement without waiving its ability to resist the Union's "acceptance" of the Employer's last proposal, that rationale is inapplicable to this case, as the Employer raised that issue on the very first business day after the week in which the Employees had all come back to work and expressed their dissatisfaction with the Union.

The Board's Supplemental Decision also seems to be premised on the contention that the Employer has sole control over the timing of its announcement that it was withdrawing Union recognition based on a good faith doubt of a lack of the Union's majority status, and elected not to withdraw its Union recognition. Clearly, the ability to withdraw Union recognition based on the Employer's good faith doubt that the Union maintains a majority status is not a matter which is based upon a precise mathematical formula, and an Employer who prematurely attempts to disavow its obligation to deal with the Union, based on the Employer's alleged good faith doubt that the Employer has lost its majority status is exposed to Unfair Labor Practice charges. Prior decisions of this same Circuit clearly indicate that an Employer must be absolutely certain and secure in its assessment of the factual basis for its alleged good faith doubt of the Union's majority status before attempting to rescind its relationship with the Union. *NLRB v. Laverdiere's Enterprises, 933 F.2d 1045, 1051-1053 (1st Cir. 1991); Bolton-Emerson v. NLRB, 899*

F.2d 104, 16 (1st Cir. 1990). On the other hand, the Employer is faced with possible Unfair Labor Practice charges if, in fact, it **continues** its recognition of the Union when it clearly has reason to believe that the Union no longer enjoys a majority status. *International Ladies' Garment Workers Union v. NLRB, 366 U.S. 731, 732-733 (1961).* It would be an unfair and unreasonable requirement to place a burden upon the Employer to have to go through the difficult and prolonged process of accurately evaluating the current majority status of the Union (at the peril of incurring possible Unfair Labor Practice charges)[1] and then having to decide whether or not to formally announce its disavowal of its obligation to deal with that Union within a matter of hours or even days of the Employer's first receiving the factual information which could serve as a possible basis for the conclusion that the Union no longer enjoyed a majority status.

While there surely would reach a time when the Employer's delay in making such a formal announcement to the Union would be considered to be unreasonably late, it is respectfully submitted that the facts of this case do not indicate any such delay on the part of the Employer, and its advising the Union on Monday, November 28th that it was withdrawing its recognition (an announcement made only days after the full impact of the employees' withdrawal of

[1] The dilemma faced by an Employer having to determine when it is permissible to assert its good faith doubt that the Union no longer maintains a majority status is demonstrated in the instant case where the Board's decision implies that the Employer waited **too long** to announce its decision, yet General Counsel, before the Administrative Law Judge, argued at length that, even as of November 28th, when the Employer announced its good faith doubt, the Employer did not yet have a sufficient factual basis for that good faith doubt.

Union support had been made apparent to the Employer), certainly was timely, and the ability of the Employer to make such a withdrawal should not be thwarted by the Union's having literally run to the Western Union office to send a Sunday evening telegram to the company's president, purporting to "accept" the last Employer offer. Such an insincere "acceptance" was obviously made at a time when both the Union and the Employer were aware that there was no longer any significant Employee support for the Union, and should not be treated as a bar to the Employer's timely and legitimate withdrawal of recognition from the Union.[2]

The Board itself, in its Supplemental Decision of May 9, 1995, recognized that, where the Employer's assertion of a good faith doubt is "simultaneous with the Union's attempt to accept the Employer's outstanding offer", difficult problems are presented and should be decided on a case-by-case basis. (NLRB Slip Op. p. 11-12) However, although the Board accepts the Employer's contention that much of the factual basis upon which the Employer finally concluded that the Union no longer enjoyed a majority status did not take place until the week of November 21, 1988 (Appendix p. 35a), it determined that the Employer's assertion of a good faith doubt only a few days later was "untimely".

Were the question simply one of Williston's application of principles of contract law, one could

[2] In an earlier decision, *Viking Lithographers, 184 NLRB 139 (1970)* which the Board has apparently now rejected, the Board had referred to such telegrams of "acceptance", sent at a time when the Union's employee support had clearly evaporated, as a "capitulated . . . contractual surrender" which would not place any obligation on the Employer to accept.

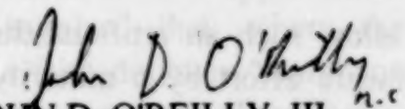
understand a ruling being made that an outstanding offer may be accepted by the one who wins the race to the telegraph office. However, such a ruling in a labor law context would completely deny the statutory rights of employees to be represented by a Union of their own choice, and in this case, the employees clearly no longer wished to have any affiliation with this Union. However, as the result of the NLRB ruling as eventually affirmed by the Court of Appeals below, the Employer, simply by being out-raced to the telegraph office, is deprived of the opportunity to present evidence reflecting the basis for his reasonable good faith belief that the Union had lost its majority status.

To allow such an artificial distinction based on a clearly insincere effort by a minority Union to bind the employees to a three-year agreement is clearly unwarranted. The Seventh Circuit, in *Chicago Tribune, supra*, determined that the bargaining rights of the employees would be improperly and unjustifiably thwarted if the Employer were not allowed, **based on facts known to it at the time** of the Union's "acceptance" (as opposed to facts which might subsequently come to the Employer's attention) to question the Union's majority status.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted to resolve the above-described split among various Circuit Courts of Appeals as to whether an Employer in the circumstances of this case may withdraw recognition from the Union and refuse to consider a Union "acceptance" of an earlier Employer proposal when, at the time of that "acceptance", the Employer has a reasonable and good faith doubt as to the Union's continued majority status.

Respectfully submitted,



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Dated: October 19, 1995

LABOR MANAGEMENT RELATIONS ACT

SEC. 8. (a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

United States Court of Appeals
For the First Circuit

No 91-1905

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
AUCIELLO IRON WORKS, INC.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before

Selya, Circuit Judge,
Campbell, Senior Circuit Judge,
and Keeton,* District Judge.

John D. O'Reilly, III, with whom O'Reilly & Grasso was on brief for respondent.

Collis Suzanne Stocking with whom Jerry M. Hunter, General Counsel, D. Randall Frye, Acting Deputy General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel, were on brief for petitioner.

July 21, 1995

* Of the District of Massachusetts, sitting by designation.

CAMPBELL, Senior Circuit Judge. Several years ago, the National Labor Relations Board ("the Board") petitioned this court for enforcement of an order it had issued against Auciello Iron Works, Inc. ("the Company") pursuant to § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) ("NLRA"), We affirmed, in large part, the Board's decision underlying the order. NLRB v. Auciello Iron Works, Inc., 980 F.2d 804 list Cir. 1992). However, while retaining jurisdiction, we declined to enforce the order and remanded to the Board for further consideration of an issue which we found the Board to have inadequately addressed. The Board has now, at long last, responded by issuing a comprehensive supplemental decision and order addressing the problems raised in our opinion. Auciello Iron Works, Inc., 317 N.L.R.B. No. 60 (1995). Pursuant to our invitation, both parties have commented on the Board's opinion. We now grant the Board's petition for enforcement of its order.

The Board issued its original order upon concluding that the Company had committed an unfair labor practice in refusing to negotiate with the Shopmen's Local Union No. 501, a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL-CIO) ("the Union "). a union certified to be the exclusive collective bargaining representative for a

number of the Company's employees. Auciello Iron Works, Inc., 303 N.L.R.B. 562 (1991). During negotiations for a new collective bargaining agreement, the Union had accepted one of the Company's outstanding proposals.[1] The Company, however, subsequently refused to sign an agreement based on that proposal and withdrew its recognition of the Union .

In concluding that the Company had thereby committed an unfair labor practice, the Board affirmed the administrative law judge's refusal to consider the Company's defense that, at the time the Union accepted the Company's contract proposal, the Company entertained a good- faith doubt of the Union ' s majority status, The Board thus refused to allow the Company to present evidence that the Union in fact lacked majority support at the time it accepted the Company' s outstanding offer. In a footnote to its summary opinion, the Board wrote:

> We agree that under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a

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[1] In opposition to the petition for enforcement, the company challenged the continuing availability, and the subsequent acceptance, of its proposal. In our previous opinion, we affirmed the NLRB's finding that the proposal was still open and that the union had accepted it. Auciello, 980 F.2d at 808-09.

respondent's alleged good-faith doubt of the union's majority status. Belcon, Inc., 257 NLRB 1341, 1346 (1981); North Bros. Ford, 220 NLRB 1021, 1022 (1975). Auciello Iron Works, Inc., 303 N.L.R.B. 562, 562 n.2 (1991).

Unsatisfied with the Board's brief treatment of this issue, we remanded for further consideration. Although we recognized that Board precedents clearly barred employers from raising a good-faith doubt about a union's majority status arising from events occurring after the parties reached an agreement, see, e.g., North Bros. Ford, Inc., 220 N.L.R.B. 1021, 1022 (1975), we found it less clear that such a prohibition extended to bar good-faith doubts arising from events occurring before the parties reached an agreement. We thus objected to the Board's casual extension of the "contract bar rule " to pre-agreement doubts about majority status , without any reasoned policy analysis to support that extension. We were further troubled by the fact that neither party had addressed the Seventh Circuit's decision in Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992), which was handed down prior to oral argument in this case and which reached a result at odds with the Board's conclusion.

Unlike the Seventh Circuit, however, we did not undertake to pass ultimate judgment on the

appropriateness of the Board's policy judgment. We noted instead that the Board " has the chief responsibility for developing coherent and correct labor negotiation rules" and that the question "calls for the Board's reasoned application of its expertise." Auciello, 960 F.2d at 812, 813. We therefore remanded to the Board, ordering it to " revisit , clarify , and explain the principles that it thinks apply in the present circumstances." Id. at 812.

The Board has responded with a thorough supplemental decision in which it affirms its earlier conclusion, namely, that an accepted offer bars an employer from later raising, as a defense to an unfair labor practice charge, a good faith doubt about the union's majority status arising out of events occurring prior to the acceptance of the offer. Auciello Iron Works, Inc., 317 N.L.R.B. No. 60 (1995). Now, however, the Board has for the first time articulated the policy considerations underlying its rule, weighing both the advantages and disadvantages of varying rules in the specialized collective bargaining context. The Board found that the policies underlying the relevant provisions of the NLRA and earlier Board precedents supported extending the contract-bar rule to cover good faith doubts arising from events occurring prior to the acceptance. In particular, the Board found that the rule furthered the policy of preserving stable bargaining relationships and did not undermine the policy of preserving the workers' freedom to choose their own representatives . Pursuant to our

remand, the Board also considered the Seventh Circuit's opinion in Chicago Tribune, concluding that it was inconsistent with the policies underlying the NLRA.

As earlier stated, the Board's policy judgments on this type of question are entitled to substantial deference from the courts. "Especially as the relevant principles here are informed less by statutes than by Board policies set out in its decisions, the area is one where the Board's presumed expertise is key." Auciello, 960 F.2d at 812. The public, the bar, the parties, and the courts are entitled, however, to have the Board's key rulings supported by "articulate, cogent, and reliable analysis." Id. at 813 (citations omitted). Having at last the benefit of the Board's explanation, we are now satisfied, as we were not before, that the Board's decision is amply supported by rational application of its expertise. While the question is perhaps close, the Board's policy choice is reasonable and, as now articulated, quite persuasive. The Board's choice falls well outside the sphere of arbitrariness that might tempt us to substitute our own judgments for the Board's expertise on a question like this. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts.")

We accordingly accept the Board's ruling that, absent exceptional circumstances[2], an employer is barred

[2] The Company seeks to bring this case within the exception set forth in the Board's opinion for cases in which a company's good faith doubt arises simultaneously with the union's acceptance of the offer. See Auciello, 317 N.L.R.B. No. 60, at 11-12. We agree with the Board's implicit conclusion that this case does not fall within the exception, as the Company had all of the relevant information to support its claim prior to its acceptance of the offer.

in these circumstances from raising, after the union's acceptance of its outstanding offer, a defense of good faith doubt as to the union' s majority status premised on events prior to that acceptance. In adopting the Board's rule, we reach a result different from that of our sister circuit in Chicago Tribune, Co. , 915 F.2d at 250. The Seventh Circuit was, however, without the benefit of the Board's present analysis. We hope the time and effort expended in this case will cause the Board to avoid the kind of perfunctory, inarticulate decision-making that caused the present difficulties.

The Company argues finally that, even if we uphold the Board's decision, we should condition enforcement of the Board's order upon a Board-supervised election to ensure that the Union still enjoys the support of the workers. The Company cites NLRB v. LaVerdiere's Enter., 933 F.2d 1045, 1053 (1st Cir. 1991), in which we refused to enforce the Board's bargaining order and instead ordered an election where: (1) there existed a showing of substantial employee dissatisfaction with the union prior to the employer's

misconduct; (2) the employer's misconduct was less than egregious; and (3) there had been an inordinate delay in the Board's decision.

Although there is no doubt that a great amount of time has elapsed since the underlying unfair labor practice, we are disinclined to order, on our own initiative and contrary to the Board's requested relief, a Board-supervised election at this point. This case is distinguishable from LaVerdiere's, insofar as LaVerdiere's involved a clear showing of employee dissatisfaction with the union. In that case, the employees had filed a decertification petition with the Board, and had exhibited other substantial evidence of dissatisfaction. Id. at 1048, 1054. In this case, by contrast, although there existed evidence that the strike was losing employee support, the evidence that the Union was losing employee support fell far short of that in LaVerdiere's. Accordingly , without meaning to pass judgment on the propriety of an election should one be sought and considered in another context, we enforce the Board's order in its entirety. See id. at 1053 (holding that the Board's choice of remedy is entitled to deference).

The order of the Board will be enforced.

Notice: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board. Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Auciello Iron Works, Inc. and Shopmen's Local Union No. 501 a/w International Association of Bridge, Structural and Ornamental Iron Workers (AF-CIO). Case 1-CA-25969

May 9, 1995

SUPPLEMENTAL DECISION AND ORDER BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

This case is on remand from the United States Court of Appeals for the First Circuit[3] The court has

[3] On June 27, 1991. the National Labor Relations Board issued its Decision and Order in this proceeding in which it found inter alia. that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from the Union and by refusing to, execute an agreed-on collective-bargaining agreement. 303 NLRB 562. Thereafter, the Board filed with the court a petition for enforcement of its Order. in an opinion dated November 30, 1992. the court remanded the case in part for further proceedings consistent with the court's opinion. NLRB v. Auciello Iron

instructed the Board to determine whether the Board erred in refusing to consider the Company's argument "that, in declining to recognize the Union or to bargain further with it, the Company was acting pursuant to a well-supported good-faith doubt that the Union still had majority support among those it supposedly represented."[4] The court questioned whether the Company should be permitted to present evidence that, at the time of the certified Union's purported acceptance of the Company's outstanding offer during negotiations for a successor labor agreement, the Union lacked majority support and was therefore incapable of creating by its acceptance a valid contract. The Board accepted the court's remand

A. Background: The Case Before the Board and the Court

The relevant facts are undisputed. The Respondent operates an iron fabrication shop. In 1977, the Board certified the Union as the collective-bargaining representative of the Respondent's production and

Works, 980 F.2d 804 (1st Cir. 1992).

By letter dated April 22 1993, the Board notified the parties that it had accepted the court's remand and that statements of position could be filed with respect to the issues raised by the court's opinion. The General Counsel and the Respondent filed statements of position with the Board.

[4] 980 F.2d at 813.

maintenance employees. Since that time, the parties have executed successive bargaining agreements. On September 21, 1988,[5] 4 days before the agreement then in effect was to expire, the parties commenced negotiations for a new agreement and met on several occasions in September and October. On October 13, the union membership voted to reject the Respondent's latest proposal and to strike. A strike commenced on October 14.

Negotiations continued on October 18 and November 17, when the Respondent presented numerous proposals. The picketing effectively ended by November 18. On November 27, the Union notified the Respondent by telegram that the unit employees had voted to accept the November 17 offer and to return to work.[6] On November 28, the Respondent sent the Union a telegram stating in pertinent part: "Employer now has reason to believe that Local 501 no longer represents a majority of employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations." In support of its contention, the Respondent relied, inter alia. on employee criticisms of and statements of disaffection

[5] All subsequent dates are in 1988 unless otherwise indicated.

[6] The court enforced the Board's findings that the Respondent's offer remained open and available for acceptance on November 17 when the Union accepted it. and that ratification by the union membership was not a precondition to the formation of a contract These issues are not before the Board in this proceeding.

with the Union, abandonment of the strike by several employees, and the refusal of other employees to strike, all of which occurred prior to the Union's November 27 acceptance of the Respondent's proposals.

The strike ended as stated in the Union's November 27 telegram, but the Respondent refused to sign a collective-bargaining agreement containing the terms of its November 17 proposals. No further negotiations occurred.

The complaint alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a written contract and by withdrawing recognition from the union. The Respondent contended, inter alia, that it had a good-faith doubt that the Union continued to represent a majority of the unit employees, and on this basis disclaimed any further obligation to bargain with the Union.

The administrative law judge found that after the Union accepted the Respondent's contract offer, the parties had formed a valid contract and the Respondent could not rely on a good-faith doubt of the Union's majority status to withdraw recognition or avoid its contractual bargaining obligations. The judge therefore found it unnecessary to consider whether the Respondent's alleged good-faith doubt was supported by reasonable and objective evidence. The Board adopted the judge's findings that the Respondent violated the Act as alleged, stating:

> [U]nder established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a respondent's alleged good-faith doubt of the union's majority status. *Belcon, Inc.*, 257 NLRB 1341, 1346 (1981); *North Bros. Ford*, 220 NLRB 1021, 1022 (1975).[7] We also agree with the judge that the Board's decision in *Bickerstaff Clay Products*, 286 NLRB 295 (1987), enf. denied 871 F.2d 980 (11th Cir. 1989), in which the Board addressed the respondent's good-faith doubt defense

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[7] In *Belcon*, as here, the employer withdrew recognition after the union accepted its contract offer, relying on conduct that occurred prior to acceptance to support its alleged good-faith doubt. There, the Board adopted the judge's finding that the respondent's withdrawal of recognition was unlawful because "it was during the term of the newly negotiated agreement and at a time when it was not lawfully permissible for [r]espondent to do so." 257 NLRB at 1346.

The Board in *North Bros. Ford* held that once the parties reached final agreement on the substantive terms of the contract. the employer was not free to refuse to bargain even if it had lawful grounds for believing that the union had subsequently lost its majority status.
220 NLRB at 1022.

In *Bickerstaff Clay Products*, the Board found that the employer had not met its burden of establishing a good-faith doubt, where as here, the respondent first raised the doubt after the union had accepted its offer.

even though the Board found that the parties had reached a binding agreement, did not overrule the precedent followed in *Belcon*.[8]

In its opinion, the court questioned the Board's reliance on *North Bros. Ford*, stating that the Board failed to address the Respondent's contention "that a lack of majority status on the date the Union purported to accept the Company's outstanding offer should be distinguished from a good faith doubt of majority status based on events occurring after a valid contract was made," as in *North Bros. Ford*.[9] The court questioned whether the acceptance of a contract offer by a union that lacks majority support at the time of acceptance can create a valid and binding contract that prevents the employer from withdrawing recognition or otherwise refusing to bargain based on an alleged lack of majority status during the contract term.

In asking for a clearer explication of the Board's position, the court instructed the Board to address the Seventh Circuit's decision in *Chicago Tribune Co. v. NLRB*,[10] which, relying on Ladies *Garment Workers , v. NLRB*,[11] denied enforcement of the Board's Order that the

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[8] 303 NLRB at 562 fn 2.

[9] 980 F.2d at 812. The court acknowledged that *Belcon* was not so limited

[10] 965 F. 2d 244, 250 (7th Cir. 1992), rehearing denied Nos. 91-2750, 91-2916 (June 24, 1992, denying enf. 303 NLRB 682 (1991).

employer recognize and bargain with the union.[12] The Seventh Circuit observed that the Board's approach in Chicago Tribune appears to conflict with the firmly established principle that an employer may not contract with a minority union.[13]The First Circuit in this case also

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[11] 366 U.S. 731 (1961).

[12] *Chicago Tribune Co.*, 303 NLRB 682 (1991) (where parties reached agreement and formed a binding contract, the employer was not entitled to rely on conduct that occurred prior to the contract's formation to support a good-faith doubt of the Union's continuing majority status as a defense to 8(a)(5) allegations; there were no changed circumstances that would have led parties reasonably to conclude that the respondent's offer was withdrawn).

[13] The Board in Chicago Tribune adopted without comment the administrative law judge's detailed rationale for requiring an employer to raise the good-faith doubt defense to, an 8(a)(5) allegation prior to the formation of an otherwise valid contract The judge dismissed the difficulty of litigating the concept of a "good-faith doubt" that is first expressed after a contract is reached, particularly when the employer is seeking to show the doubt as it existed in the employer's mind at the time of the contracts formation. Describing such an inquiry as too subjective. the judge reasoned that the relevant inquiry should instead be whether changed circumstances exist to vitiate an outstanding contract offer accepted before the refusal to bargain. The judge found that because the factors on which the respondent relied to support in good-faith doubt were present and known at the time the respondent renewed its offer, they were not changed circumstances" that would have led both

noted that in two other cases the Board appears to have overlooked altogether its *North Bros. Ford* and Belcon precedent" and "allowed an employer to litigate an issue of good faith doubt after the union had accepted an outstanding offer": *Curtin Matheson Scientific, Inc.*,[14] and *Bickerstaff Clay Products Co.*,[15] 980 F.2d at 812 (emphasis in original). stating that it was "without policy

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parties reasonably to conclude that the respondent had withdrawn the offer. Therefore, the judge concluded in good-faith doubt defense failed because it was not conveyed to the union prior to the formation of the contract. 303 NLRB 690-691.

As indicated the Seventh Circuit in denying enforcement in *Chicago Tribune* focused on the statutory issues raised by Sec. 8(a)(2). The court found that the Board's Rule that a union's acceptance of offer creates a binding contract, if applied in the context of a loss of majority support" would violate the principle of *Ladies Garment Workers*, 366 U.S. at 737-738, that an employer may not contract with a "minority union" would give too much weight to the interests of unions and too little weight to the interests of employees, and would authorize "sweetheart deals" between companies and unions at the employees' expense. The court also suggested that the Board's blocking charge rule unfairly prevents employers from challenging a union's majority status, a factor not present here. 965 F.2d at 250.

[14] 287 NLRB 350 (1987). enf. denied 859 F.2d 362 (5th Cir. 1988), rehearing denied 864 F.2d 791 (5th Cir. 1988), revd. 494 U.S. 775 (1990), on remand 905 F.2d 871 (5th Cir. 1990).

[15] 286 NLRB 295 (1987), enf denied 871 F.2d 980 (11th Cir. 1989), cert. denied 493 U.S. 924 (1989).

guidance and reasoned analysis to decide the issue," the court remanded the case, instructing the Board "to revisit, clarify and explain the principles that it thinks apply to the present circumstances," and to explain the application of precedent in factually distinguishable situations.[16]

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[16] 980 F.2d at 812-813.

Although some of the court's language in ordering a remand in this case refers to an "actual loss" of majority status as well as a good-faith" doubt of majority status, there is a significant distinction between a case involving a claim of actual loss of majority status and one involving a claim of good-faith doubt. As the Supreme Court stated in *NLRB v. Curtin Matheson Scientific, Inc.* 494 U.S. 775, 787 fn. 8 (1990), unlike in an actual loss of majority status case, an employer need not show an actual numerical loss of majority support to prove a good-faith doubt and may rely instead on circumstantial evidence to satisfy its burden of proof. We emphasize that this case involves only the issue of whether the Respondent had good-faith doubt that the Union retained majority support. In fact at no point in the proceedings before the Board or the court did the Respondent urge that the Union had suffered an actual loss of majority support and there has been no finding that, or discussion of whether, the Union actually lacked majority status when it accepted the Respondent's final contract offer. As the Respondent stated in its supplemental brief to the Board: "[T]he issue which has been remanded to the Board by the Court of Appeals is whether an employer who, at the time of a Union's effort to accept a previously expressed management proposal, has a good faith doubt of the Union's continued majority status, may refuse to execute an agreement based on that Union's

B. Contention of the Parties

The General Counsel contends that the Board should adhere to its decisions in *Belcon and Chicago Tribune* and affirm its findings that the Union's acceptance of the Respondent's offer created a valid contract that precluded the Respondent from demonstrating its alleged good-faith doubt. As a basis for this contention, the General Counsel relies on the presumptive majority status of a union during the life of a contract The General Counsel further argues that a rule permitting an employer to "sit" on a purported doubt to await the outcome of contract negotiations and to raise its doubt because of subsequent dissatisfaction with the contract would encourage employers to manipulate the bargaining process resulting in "inequity and ... destabilize[d] bargaining relationships." The General Counsel also contends that reliance on *Ladies Garment Workers* is misplaced because the union in that case, unlike the certified Union here, had never enjoyed majority support when the employer granted recognition.[17]

'acceptance' and whether it should be allowed to present evidence to support its claim that, at the time of the Union's 'acceptance' it had a basis for such good faith doubts. "Therefore, we address here only the Respondent's good-faith doubt in defense in evaluating the 8(a)(5) violations alleged.

[17] Finally, the General Counsel maintains that if the Board reaches the merits of the Respondent's good-faith doubt defense, the Respondent did not have the necessary objective evidence to support its alleged good-faith doubt The Respondent contends to

The Respondent, citing *Ladies Garment Workers*, contends that the Board's refusal to consider its alleged good-faith doubt violates the principle that an employer may not enter into an agreement with a minority union and that the Board's general rule that a contract offer is open for acceptance until an employer expressly withdraws it must be conditioned on the union's maintaining majority status through acceptance. Arguing that this case involves a contract forced on management by a minority union, the Respondent further contends that the Board's result forces unwanted representation on employees in the same way as occurs when a colluding union and employer, faced with a loss of the union's majority support and the possibility of a decertificaxion petition, sign a contract in violation of Section 8(a)(2) and (1) and Section 8 (b)(1)(A).

Finally, the Respondent maintains that the Board's refusal to consider its alleged good-faith doubt is inconsistent with *Curtin Matheson Scientific. Inc.*, above, and *Bickerstaff Clay Products*, above. and with the Board's decision in *Viking Lithographers*.[18] The Respondent argues that the Board, in contrast to this case, permitted the employers in each of those cases to litigate an alleged good-faith doubt as a defense to 8(a)(5) charges when the refusal to bargain was based on the employer's

the contrary.

[18] 184 NLRB 139 (1970).

rejection of the union's purported acceptance due to an alleged erosion of the employers' union support.

As noted above, the Board has accepted the court's remand. As the court has reminded us, our responsibility is to develop coherent and correct legal standards governing labor negotiations and to explain their application to the relevant facts. The precise issue before us is whether, when negotiations for a collective-bargaining agreement after the certification year has ended have culminated in the union's acceptance of an employer's contract proposals, an employer may withdraw recognition or otherwise refuse to bargain by presenting objective evidence, in existence and known to the employer before acceptance, to support a good-faith doubt that the union lacked majority status at the time of acceptance.[19]

For the reasons below, we reaffirm our findings that the Union's acceptance of the Respondent's November 17 proposals created a valid and binding contract, and that the Respondent was not thereafter entitled to present evidence of a good-faith doubt as a defense to the allegation of an 8(a)(5) violation.

We have structured our analysis to respond to the court's concerns. After discussing the Board's

[19] As our analysis will make clear, this case does not involve an employer's voluntary initial recognition of a union or an alleged actual loss of a union's majority status. See fns. 14, supra, and 74, infra.

presumptions regarding a certified union's majority status and the statutory policies that the presumptions further, we set forth legal principles, based on statutory, practical, and policy considerations, governing when an employer lawfully may refuse to bargain based on an alleged good-faith doubt. Our discussion accords with and elaborates on the administrative law judge's analysis in *Chicago Tribune*. As instructed by the court, we also analyze the statutory issues the Seventh Circuit raised in *Chicago Tribune*. In this regard, we examine the specific conduct prohibited by Section 8(a)(5) and (2) of the Act, discuss the applicability of these provisions to the Respondent's withdrawal of recognition, and consider analogous cases in which Congress, the Board, and the Supreme Court have resolved the tension between the policies arising out of obligations imposed by Section 8(a)(5) and those imposed by Section 8(a)(2).

C. *The Boards Mandate and the Presumptions Respecting a Certified Union's Majority Status*

The Board's mandate in administering the Act is to further industrial peace and labor relations stability by encouraging the practice and procedure of collective bargaining while preserving for employees the right to choose, or to refrain from choosing, a bargaining representative.[20] In enforcing the nation's labor laws, the

[20] See 29 U.S.C. Sec. 151.

Board seeks to balance these dual objectives while recognizing that the overriding policy of the Act is "industrial peace."[21]

The Board has established several presumptions respecting a union's majority support in order to further industrial peace by promoting stability in collective-bargaining relationships without impairing the free choice of employees.[22] The presumptions "indicate the relationship between the existence of a Board certificate and the right of an employer to question a union's majority in good faith."[23] At the outset, it is well settled that absent unusual circumstances a union enjoys an irrebuttable presumption of majority status during the first year following its certification. After the certification year (and in the absence of a collective-bargaining agreement), the presumption of majority status remains, but becomes rebuttable.[24] An employer may rebut the presumption of majority status by establishing either (1) that at the time of the refusal to bargain a majority of employees did not in fact support the union, or (2) "that the refusal was predicated on a good-faith and reasonably

[21] *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 38-39 (1987); *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

[22] See *Fall River*, 482 U.S. at 38-39.

[23] *Celanese Corp. of America*, 95 NLRB 664, 671 (1951), overruled in part on other grounds *Hawaii Meat Co.*, 139 NLRB 966, 968 (1962).

[24] *Fall River*, 482 U.S. at 37-38 (and cases cited therein).

grounded doubt, supported by objective considerations, of the union's majority status." [25]

A valid collective-bargaining agreement also affects the presumptions of majority status. In general, a union enjoys an irrebuttable presumption of majority status during the contract term.[26] On the contract's expiration, the presumption becomes rebuttable.[27] The issue here arises at the time the rebuttable postcontract term presumption would become the irrebuttable contract term presumption and raises the question whether that change in status can occur when an employer asserts that it had objective evidence to support a good-faith doubt of majority status before or at the time the union accepted its offer, but had failed to raise such a doubt until after the agreement was reached pursuant to that acceptance.[28]

[25] *Burger Pits, Inc.*, 273 NLRB 1001, 1001 (1984), enfd. 785 F.2d 796 (9th Cir. 1986).

[26] We note, however, that with the exception of the healthcare industry and seasonal operations, a rival representation or decertification petition may be filed during that "window" period which is more than 60 days but less than 90 days before the expiration date of the existing contract of 3 years' duration or less.

[27] *Burger Pits*, 173 NLRB at 1001 (and cases cited therein).

[28] See *Chicago Tribune Co.*, 965 F. 2d at 250.

The First Circuit in remanding the present case stated that the Board's decisions regarding the availability of the good-faith doubt defense after the parties have reached a binding agreement

As the Supreme Court in *Fall River* noted, the Board bases its presumptions of majority status not on absolute certainty that the union's majority status will not erode following certification, but rather on carefully considered policy choices intended to further the Act's objectives. The Court, commenting approvingly on the Board's presumptions concerning majority support for an incumbent union, explained how the presumptions promote industrial peace:

> In essence, [the presumptions] enable a union to concentrate on obtaining and fairly administering a collective bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. ... The

are based on the contract bar rule. 980 F.2d at 810. Under that rule, a contract meeting certain requirements is valid and will bar an election. See generally *Hexton Furniture Co.*, 111 NLRB 342 (1955). Although the Board has on occasion framed its discussion of a union's continuing majority support during the term of a contract in terms of the contract bar rules (see, e.g., *Westwood Import Co.*, 251 NLRB 1213, 1213-1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982)). we emphasize that the precise rule of law applicable here is the irrebuttable presumption that a union retains majority status during the contract. We note, however, that the same policy underlies both the presumptions of majority status and the contract bar rules: achieving a reasonable balance between industrial stability ad employee freedom of choice. See *Crompton Co.*, 260 NLRB 417, 418 (1982), and discussions below.

> presumptions also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees . . . . The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace.[29]

D. *Circumstances Under Which an Employer May Withdraw Recognition Based on Good-Faith Doubt*

In accord with the court's instructions, we now examine when an employer may lawfully withdraw recognition or otherwise refuse to bargain based on a good-faith doubt of a certified union's continuing majority status. Before addressing the facts here, we set forth two related rules and their rationales.

1. Within a reasonable time before a collective-bargaining agreement expires, an employer that establishes a good-faith doubt of a union's majority status may announce that it does not intend to negotiate a new agreement.[30] Additionally, after the contract has expired,

[29] 482 U.S. at 38-39 (citations and footnotes omitted). Although the issue in *Fall River* concerned a successor employer's obligation to bargain under the Act we find that the Court's discussion of the rationale supporting the presumptions is also pertinent to the issue presented in this case.

[30] *Burger Pits*, 273 NLRB at 1001.

an employer is entitled to raise a good-faith doubt of a union's continuing majority status at any time prior to a union's acceptance of its contract proposals.[31] The existence of a good-faith doubt is a question of fact. The employer has the burden of proving that it had a reasonable, good-faith belief that the union no longer represented a majority of the bargaining unit employees.[32] Although the good-faith doubt must be reasonably grounded and supported by objective considerations known to the employer, the employer need not conclusively demonstrate that a majority of its employees

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[31] This was, in fact the situation present in *Viking Lithographers*, in which the Board found that where the parties during contract negotiations had not reached a complete agreement the employer did not violate Sec. 8(a)(5) and (1) by withdrawing recognition from the union based on reasonable objective factors to support its good-faith belief that the union had lost majority status. Specifically, the Board found that although the union had accepted the respondent's purported "final offer," there was in fact no final offer "comprising a complete contract." 184 NLRB at 139-140. We therefore reject the Respondent's contention that *Viking Lithographers* is dispositive here, and we find that case factually distinguishable from the present one. We reaffirm our finding in our initial decision, as enforced in pertinent part by the court that unlike in *Viking Lithographers*, the parties here had reached a complete and binding agreement when the Respondent sought to withdraw recognition.

[32] *Pilgrim Industries*. 286 NLRB 244 (1987).

no longer desire to be represented by the union.[33] When, however, an employer fails to assert a good-faith doubt by announcing it and acting on it during the period when the presumption is rebuttable, no evidence exists from which to infer that the employer has rebutted the presumption of the union's continuing majority. From a practical standpoint the placement of the burden of proof on an employer stabilizes labor relations-and protects employee free choice--by prohibiting an employer from withdrawing recognition or refusing to bargain without first adducing objective evidence of its employees' desires to no longer be represented by the union.

2. We reaffirm the rule set forth in *North Bros. Ford* that a union's acceptance of an employer's outstanding contract offer precludes the employer from raising a good-faith doubt of the union's majority status based on events occurring after acceptance. Thus, the employer's good-faith doubt based on subsequent events is not available to defend a refusal to execute a valid agreement or a withdrawal of recognition. This rule is based on the fact that before or at the time the contract was formed no one had questioned the majority status of the union and the consequent validity of the agreement. As the Supreme Court reasoned in *Fall River*, this rule promotes industrial peace and labor relations stability by enabling a union to concentrate on obtaining and fairly

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[33] *NLRB v. Randle-Eastern Ambulance Services*, 584 F.2d 720, 728 (5th Cir. 1978).

administering its collective-bargaining agreements without the concern that, absent immediate results, it will lose majority support and be decertified.[34]

3. Turning to the facts of this case, we reaffirm the principle applied in our initial decision and in the Board's decisions in *Chicago Tribune* and *Belconz*: where objective evidence to support a good-faith doubt of a union's majority status is known to the employer before a union's acceptance of the employer's contract offer but the employer does not act on that evidence prior to acceptance, the union's acceptance creates a valid collective-bargaining agreement. Therefore, an employer that disclaims its bargaining obligation in reliance on a good-faith doubt at that point violates Section 8(a)(5) of the Act. Further, the employer is precluded during the contract term from withdrawing recognition or otherwise refusing to bargain based on an alleged good-faith doubt that the union lacked majority status at the time of acceptance. We adhere to this rule for the following reasons.

E. *Statutory Considerations Arising from Section 8(a)(5)*

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. The Supreme Court in *First National Maintenance Corp. v.*

[34] 482 U.S. at 38-39.

NLRB described the labor policies furthered by the statutory bargaining obligation:

> A fundamental aim of the [Act] is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. ... Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management... Congress ensured that collective bargaining would go forward by ... giving [the NLRB] the power to condemn as unfair labor practices certain conduct by unions and employers that it deemed deleterious to the process, including the refusal "to bargain collectively."[35]

Relying on this mandate, we agree with the administrative law judge in *Chicago Tribune* that it is inconsistent with the concept of good-faith bargaining for the Board to adopt a rule that an employer may continue to bargain-and thus to treat the union as the representative of a majority of its employees-by leaving its contract offer on the table to await the outcome of negotiations before deciding whether to raise a doubt of the union's majority support based on grounds that it knew existed prior to the formation of the contract. [36]

[35] 452 U.S. 666, 674 (1981) (footnotes and citations omitted).

Case law supports this interpretation of the obligations imposed by Section 8(a)(5). The Board's development of the good-faith doctrine in *Celanese Corp.* makes clear that the issue of whether an employer's questioning of a union's majority status is in good faith depends not only on whether reasonable grounds exist for believing that the union lost majority support, but also on whether the employer *sought to control the timing of the assertion of the doubt* to undermine the union's representational role. The Board cautioned:

> [T]he majority issue must *not* have been raised by the employer in a context of illegal antiunion activities or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union.[37]

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[36] The Board and the courts have held that the common law rule that a rejection or counterproposal terminates an offer has little relevance in the collective-bargaining setting. In collective bargaining, an offer will remain on the table and be capable of acceptance unless the offeror explicitly withdraws it or changed circumstances would lead both parties reasonably to believe that the offer was withdrawn. *Chicago Tribune Co.*, 303 NLRB 682, 690 (1991) (citing *NLRB v. Burkart Foam*, 848 F.2d 825, 830 (7th Cir. 1988)).

[37] 95 NLRB at 673 (emphasis in original).

In a similar vein, the Court in *Fall River* explained that the presumptions of majority status remove any temptation to avoid good-faith bargaining in the hope that by delaying, an employer will unfairly undermine the union's majority status.[38] Thus, the Board has found that an employer's claim of good-faith doubt is neither held in good faith nor reasonable where the employer did not raise it until the parties had fully agreed on a contract, even though the claim was based on information known to the employer throughout bargaining.[39] Similarly, the First Circuit itself has heldthat an employer lacked good faith where, despite the employer's doubts aboutthe union's majority status it had entertained prior to negotiations, it entered into negotiations "hoping to get a contract to its liking."[40]

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[38] 482 U.S. at 38.

[39] *Bennett Packaging Co.*, 285 NLRB 602, 608 (1987). See also *King Radio Corp.*, 208 NLRB 578, 584 (1974), enfd. 510 F.2d 1154 (10th Cir. 1975), cert. denied 423 U.S. 839 (1975) (Board found employer's claim of doubt asserted as a defense to, withdrawal of recognition, was not held in good faith where it knew of the factors relied on to establish its doubt during negotiations but failed to raise the doubt until the parties were close to reaching agreement on a contract the employer did not want).

[40] *Bolton-Emerson, Inc. v. NLRB*, 899 F. 2d 104, 107 (1st Cir.1990) enfg. 293 NLRB 1124(1989).

F. *Practical and Policy Considerations*

The Board's emphasis on the timeliness of the employer's manifestation of its good-faith doubt, by, e.g.,withdrawing recognition or petitioning for an election,furthers the same principles and is in complete accord with our rationale for the two rules discussed above. The employer controls whether or when its doubt will be asserted. As noted above, without an employer's objective manifestation of the doubt, there is no doubt cast on the union's authority to bargain with the employer, and thus, no obstacle to the union's binding the employer by accepting the employer's contract offer.

Further, we share the awareness of the administrative law judge in *Chicago Tribune* of the practical difficulties of litigating a doubt alleged to have been held before or at the time the contract was reached but on which the employer did not act until after the contract was reached. As he suggested, a determination of the critical issue of whether an employer had a reasonable doubt, held in good faith but not articulated, at an"earlier unspecified time"--presumably prior to the union's acceptance of the employer's contract offer--would involve an inquiry into matters too speculative and subjective "not only to vitiate that contract but to dissolve the bargaining relationship."[41] Instead, as discussed above, the existence of a good-faith doubt of majority support is a

[41] 303 NLRB at 691.

question of fact, and to demonstrate it, the employer must show, inter alia, that the doubt is grounded in objective, demonstrable evidence.[42]

Thus, practicalities support the rule that, if an employer is aware of objective evidence to support a good-faith doubt *before* the union accepts its offer, it must, for the defense to be timely raised, act on this doubt before the union accepts its offer. Further, and this policy choice goes to the heart of the First Circuit and Seventh Circuit's concerns, if an employer fails to raise a doubt based on known preacceptance factors until after acceptance, the Board will not view those factors as "changed circumstances" vitiating the employer's offer or the contact's validity. Board recognition of the factors supporting the doubt as changed circumstances would defeat in large part the purpose of denying the employer the privilege of raising the after-the-fact doubt defense--it would vitiate a contract as to the validity of which no doubts had been raised at the, time it was formed.

Accordingly, we reaffirm as consistent with our statutory mandate and the practicalities of case litigation the rule that once the union accepts the employer's offer, in the absence of a previous assertion of good-faith doubt or other changed circumstances to call into question the union's competence to enter into a contract, the parties

[42] (40) See generally *Brown & Root U.S.A.*, 308 NLRB 1206 (1992), and *Laidlaw Waste Systems*, 307 NLRB 1211 (1992).

have fonned a valid contract precluding the employer from raising a good-faith doubt or refusing to bargain with the union during its term.[43]

Having reaffirmed that the Respondent could not raise its alleged good-faith doubt as a defense to its withdrawal of recognition and refusal to execute the contract, we find it unnecessary to pass on whether the Respondent presented sufficient objective evidence to support a reasonable, good-faith doubt of the Union's majority status. However, some features of the Respondent's evidence illusaate the practical difficulties of determining, without a timely assertion of doubt accompanied by appropriate action, *when* an employer possesses sufficient objective evidence to support an alleged good-faith doubt.[44]

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[43] We note that an employer's ability to manipulate the timing of its good-faith doubt defense and the difficulty of litigating tbe issue given that fact have influenced our approach in this case. Our focus here does not, however, necessarily carry over into other areas that do not present the same policy considerations. For example, in the case before us, the statutory period of limitations began to run when the Respondent refused to execute the contract and asserted that it was withdrawing recognition from tbe Union, not when tbe Respondent formed its good-faith doubt.

[44] Member Cohen does not rely on general pronouncements concerning tbe timliness of an employer's assertion of a good-faith doubt of majority status. He confines himself to the specific facts of this casee, i.e.. the assertion of tbe

The court found that the Respondent relied on events prior to the Union's November 27 acceptance to support its good-faith doubt, asserted on November 28. Ralph Auciello, the Respondent's vice president, testified that *after* receiving the Union's telegram, management met on November 28, discussed each employee's union sentiment, and that "at that time, it was clear to me that the union did not represent the men." He attributed this belief to employees' oral statements of dissatisfaction with the Union over several months. For example, Auciello admitted that one employee's statement that the Union was a joke could have been made immediately after the strike began or "6 months before." He could not recall the most recent conversation with an employee who did not support the Union, but testified that "quite a few" discussions occurred on November 18 and that some of the conversations took place the week of November 21.[45]

According to Auciello, November 28 was the first time that the Respondent discussed the Union's majority status "in such depth" and that management had not discussed the issue previously because contract

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doubt after a contract offer has been accepted in circumstances where tbe assertion is based on facts that were known prior to acceptance.

[45] See *Bolton-Emerson*, 293 NLRB at 1129, enfd. 899 F.2d at 107 (company representative's testimony that the company entertained good-faith doubt throughout negotiations conclusive of bad-faith bargaining).

negotiations were ongoing.[46] Auciello admitted, however,that management prepared a list of employees indicating who was likely to vote against union reptesentation "toward the end of the strike"[47] and "on or before" November 28. The Respondent did not take any action on one list because negotiations were ongoing and because the document represented a "worst case scenario."

Auciello's testimony makes it clear that the Respondent harbored its doubt while its contract offer was outstanding. If we were to permit Respondent to "sit" on that doubt and to raise it after the offer is accepted, we would effectively permit an employer to unilaterally control a vital part of the collective-bargaining process. An employer with such a doubt would then not only be able to act on it and nullify the offer, but also it could wait until the offer is accepted and then vitiate the contract. If the Board's policies were to permit an employer to retain complete control over when to act on its purported doubt, control that can even invalidate after the fact a union's prior, appropriate, and good-faith bargaining acts, the demonstration of that doubt, with its profound legal and

[46] We note that Auciello testificd that he did not take notes about the employees' antiunion sentiments until the Respondent began to prepare its response to the Union's November 27 telegram.

[47] We note that the picketing ended on November 18 and that the Union called off the strike in its November 27 telegram.

practical consequences, becomes amenable to post-hoc reasoning and self-serving interpretations.

G. Section B(a)(2), *Ladies Garment Workers, and Balancing Employee Free Choice Against Bargaining Stability*.

Our affirmation of *Belcon*, which we applied in our initial decision, is based on the obligations imposed by the statutory duty to bargain in good faith under Section 8(a)(5). The Seventh Circuit in *Chicago Tribune*[48]maintained, however, that irrespective of whether an employer continues to negotiate by leaving an offer on the table, Section 8(a)(2),[49] which protects the right of employees to decide for themselves whether to be represented, requires consideration in determining the availability of the good-faith doubt defense.[50] According to the *Chicago Tribune* court, applying *Ladies Garment Workers*, the interests of the majority of employees who had not desired representation when the contract was formed dictate that the employer should not be estopped

[48] We note that the Seventh Circuit issued its decision in *Chicago Tribune* after the instant case was argued before the First Circuit

[49] Sec. 8(a)(2) prohibits an employer from dominating or interfering with the formation or administration of any labor organization or from contributing financial or other support to it.

[50] 965 F.2d at 250.

from withdrawing its offer and refusing to bargain with the union based on an alleged good-faith doubt of the union's majority status even though it might have been at fault for leaving its offer on the table and inviting acceptance by the union.

In *Laies Garment Workers*, the employer voluntarily recognized a union based on a good-faith but mistaken belief that the union represented a majority of the unit employees. The Court heid that by extending recognition to a minority union, regardless of its bona fide belief in the union's majority status, the employer violated Section 8(a)(2), and that by its acceptance of exclusive bargaining authority the union violated Section 8(b)(l)(A). The Court held that a grant of exclusive recognition to a minority union is unlawful because the union so favored is given "a marked advantage over any other in securing the adherence of employees."[51]

We respectfully disagree that *Ladies Garment Workers* resolves the issue here. As an initial matter, this case is factually distinguishable from *Ladies Garment Workers*. The instant case concerns a certified union and the employer's obligation to bargain with it as enforced by Section 8(a)(5), whereas *Ladies Garment Workers* involved the emp!oyerr's inadvertent voluntary recognition of a union the majority of its employees never supported in violation of Section 8(a)(2). Additionally,

[51] 366 U.S. at 738 (citing NLRB v. Pennsylvania Greyhound Lines,303 U.S. 261. 267 (1938)).

this case, unlike Ladies Gannent Workers, occurred in the context of ongoing negotiations and the shifting balances of power caused by an economic strike, as discussed below. It follows from these distinctions, as well as from the different legislative purposes of the two provisions, that different accommodations between the dual interests of furthering labor relations stability and ensuring employee freedom of choice are appropriate.

Thus, *Ladies Garment Workers* presented a fundamentally different issue from the one presented here.That case involved an employer's *recognition* of a nonincumbent, initially organizing, *actual-minority* nion. This case, on the other hand, involves the Respondent's *withdrawal of recognition* of the incumbent, *presumptively majority* Union. In *Ladies Garment Workers*, the employer's asserted good-faith belief that the union had *achieved* majority status at the time of recognition was no defense to its unlawful recognition;in this case, the issue is whether the Respondent's asserted good-faith belief that the Union had lost its presumptive majority status is a validly raised defense to its withdrawal of recognition.

H. *Statutory Considerations-Section 8(a)(2)*

The violation in *Ladies Garment Workers* arose under Section 8(a)(2). The gravamen of an 8(a)(2) violation is the domination or interference by an employer with the formation or administration of any labor

organization. Congress' goal in enacting Section 8(a)(2) was to preserve for employees the right to choose their bargaining representative free of employer interference or coercion.[52] The Court in *Ladies Garment Workers* made clear that the violation found was the employer's initial grant of exclusive representation status to a union that had not been chosen by a majority of its employees.[53]

We respectfully disagree with the Seventh Circuit's finding in *Chicago Tribune* that the employers' conduct in *North Bros. Ford* and *Belcon*, and therefore also in the instant case, is prohibited by Section 3(a)(2). The Board's presumptions of continued majority status under Section 8(a)(5) operate only to mainain lawfully established continuing bargaining relaionships.[54] In *Ladies Garment Workers*, following the employer's unlawful recognition of the minority union, the Board voided the agreement and the union was no longer presumed to be the majority representative. By contrast, the Union in this case was not recognized unlawfully, but was the certified representative of the Repondent's unit employees. A Board-certified election clarifies beyond question a union's status as the emloyees' exclusive collective-bargaining representative.[55]

[52] *Electromation Inc.*, 309 NLRB 990, 994 fn. 18 (1992).

[53] 366 U.S. at 736.

[54] *Royal Coach Lines v. NLRB*, 838 F.5d 47, 51 (2d Cir. 1988).

[55] See *W.A. Krueger Co.*, 299 NLRB 914. 916 fn. 18 (1990). Members Stephens and Cohen do not rely on this and

Before acceptance of the Respondent's offer, when the Union was operating under a rebuttable presumption of continued majority support, there was no legally cognizabie evidence that continued bargaining would involve dealing with a minority union. Rather, the presumption was unchallenged at the time of acceptance, even though the Respondent and the unit employees themselves were free to attack it. Under the circumstances, Section 8(a)(2) does not preclude a finding that the parties formed a valid agreement preserving the Union's presumptive majority during the contract's term. Thus, the aim of Congress in enacting Section 8(a)(2)-to prevent employers from foisting representatives on unwilling employees[56]-is not frustrated by the presumption's protection of the status of certified incumbent union against post-hoc attack.[57]

Thus, we respectfully disagree with the courts in this case and *Chicago Tribune* to the extent that they hold

subsequent references to *W. A. Kreuger*.

[56] *Electromation*, 309 NLRB at 994.

[57] We further note that contrary to the Seventh Circuit's suggestionn in *Chicago Tribune*, the Board's blocking charge rule does not prevent an employer from challenging a union's majoriry status. An employer is entitled to secure evidence to support an alleged good-faith doubt despite the pendency of a decertification petition and is privileged to withdraw recognition based on tangiblee evidence of a loss of majority support. See *Atwood & Morrill Co.*, 289 NLRB 794 (1988).

that 8(a)(2) considerations require that an employer be permitted to raise a "reasonable doubt" defense to an 8(a)(5) withdrawal-of-recognition violation where the objective considerations assertedly supporting the reasonable doubt existed *before* the union accepted the employer's contract offer, but the reasonable doubt itself was not expressed by the employer until after the union accepted the contract offer.

I. *Voluntary Recognition as Distinct from Board Certification*

The procedure used to accord recognition to a union also affects the duration and effect of the presumption of majority status. When a union is certified following a Board-supervised election, the presumption of majority status generally remains irrebuttable for 1 year. Voluntary recognition, however, presents risks to stable bargaining relations not present where employees have chosen a union through a Board-conducted election. Thus, when an employer voluntarily recognizes a union, the Board has set the period of irrebuttably presumptive majority at a less definite "reasonable time"for bargaining.[58] Without the safeguards of a Board conducted election, voluntary recognition can lead to recognition of a minority union, as occurred in *Ladies Garment Workers*. In this case, although the certification year had ended, the

[58] See *Royal Coach Lines*, 838 F.2d at 51-52.

Union remained the presumptive majority representative of the unit employees when it accepted the Respondent's offer. The Union's longstanding status as the employees' certified bargaining representative distinguisbes it from the uncertified union in *Ladies Garment Workers*; and the national labor policy of stabilizing bargaining relationships[59]supports, from a policy perspective, our finding that the Respondent's attempted withdrawal of recognition posed a risk to stable bargaining relations not addressed by Section 8(a)(2), but falling within the purview of conduct prohibited by Section 8(a)(5) of the Act.[60]

[59] See *Excel Corp.*, 313 NLRB 588, 589 (1993), discussed below. See also *Edison Sault Electronic Co.*, 313 NLRB 753 (1994) petitioner precluded from filing unit clarification petition after contract agreement reached but prior to ratification where petitioner did not reserve the right during bargaining to file; decision extends Board's Rule and policy that to entertain a unit clarification petition during the term of a contract which defines the bargaining unit would disrupt the bargaining relationship); *Union Plaza Hotel & Casino*, 296 NLRB 918, 918 fn. 4 (1989), enfd sub nom. *E. G. & H. Inc. v. NRLB*, 949 F.2d 276, 278, 280 (9th Cir. 1991) (employer may not repudiate agreement formed but not yet signed by arguing that the unit is inappropriate because it contains statutory supervisors).

[60] We note further that an employer that has voluntarily recognized a union is permitted to defend an 8(a)(5) complaint allegation by introducing evidence demonstrating a lack of

J. The Significance of an Economic Strike During Bargaining and Shifting Balances of Power

The Seventh Circuit in *Chicago Tribune* also warned that finding a valid contract on tbe union's acceptance of an employer's offer notwithstanding that "the union lost the support of the workers" between the

majority at the time of recognition. If the employer is successful, the presumption of majority status ends. See *Moisi & Son Trucking*, 197 NLRB 198 fn. 2 (1972); *Concord Services*, 310 NLRB 821, 822 (1993). This defense, of course, is cognizable only when recognition has occurred within 6 months of the filing of the related unfair labor practice charge. See *Sewell-Allen Big Star, Inc.*, 294 NLRB 312, 313 (1989), enfd. mem 138 LRRM 2160 (6th Cir. 1991); *Jim Kelley's Tahoe Nugget*, NLRB 357 (1976), enfd 584 F.2d 293 (9th Cir. 1978), cert denied 442 U.S. 921 (1979). However, the Board's decision in *Burger Pits*,273 NLRB at 1001, suggests that even in voluntary recognition cases, once tbe parties have formed a valid collective-bargaining agreement an employer cannot challenge the union's majority status during the conract's term in order to avoid the bargaining obligations imposed by the agreement This finding reflects the Board's policy, discusscd above, of preserving enduring bargaining relationships.

Members Stephens and Cohen do not pass on the issue of whether an employer can challenge a contract based on the minority status of the union at the time of recognition, where such recognition occurred less than 6 months prior to the challenge.

offer and its acceptance would undermine employee free choice because the resulting agreements would be "sweetheart deals" between the company and the union.[61] As a practical matter, because many good-faith doubt cases occur during strikes, we find that "sweetheart" deals are less likely in this context than the court prophesied.

A strike is defined by discord between the union and the employer to gain bargaining power. In this atmosphere, an employer and a union struggling to reach agreement on contract terms, or an employer hoping to oust a union throughh weakening it during the strike,would be unlikely to conspire to bar a decertification petition, or a representation petition by another union despite their knowledge of lack of majority status. Here, far from hoping to keep a minority union in place at the employees' expense, the Respondent prepared forms for employees to resign from the Union, thus seeking to alter the prevailing balance of power and weaken the Union's economic position. The Union's eventual acceptance of the Respondent's contract offer was not collusive; it was a recognition of the Respondent's increased bargaining strength as the unit employees abandoned the strike. Yet even after the Union capitulated to the Respondent's offer, the Respondent still sought to terminate, rather than continue, the bargaining relationship.[62]

61 965 F.2d at 250.

62 In contrast to the good-faith doubt cases involving

K. *Balancing Statutory Considerations*

The court's remand calls on us to determine whether the Respondent can rely on the employees' statutory right of free choice to justify withdrawing recognition from the Union. We have found that the Respondent's conduct in bargaining with the Union does not come within the gravamen of an offense under Section 8(a)(2). However, as the Respondent's conduct implicates the employees' statutory right of free choice, we shall examine the Board's and the Supreme Court's accommodations of the dual interests in employee free choice and stable bargaining relations. We have consistently recognized in our prior decisions that employee free choice may be outweighed, in some circumstances and in limited appropriate degrees, by the goal of industrial stability, and this approach has found favor in the courts.

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certified unions, cases involving voluntary recognition-and thus cooperation-between an employer and a union present a more likely context for sweetheart deals to occur. For example, in *Baby Watson Cheesecake*, 309 NLRB 417 (1992), the Board found that the employer and the voluntarily recognized incumbent union unlawfully executed a renewal agreement when faced with an organizing campaign by a rival union, despite their knowledge that the incumbent union did not enjoy majority status.

In *Bryan Mfg. Co.*, the Supreme Court held that where a collective-bargaining agreement was executed at a time when the union did not represent a majority of the unit employees, complaints alleging lack of majority status were barred by Section 10(b) of the Act when they were filed more than 6 months after the execution of the agreement. In so finding, the Court recognized the competing interests at stake--employee self-determination versus burying stale disputes in the interest of stability-and concluded that Congress had decided the appropriate balance by establishing the 6-month statutory limitations period. Thus, the minority status of the union could not be litigated once the statutory period had run "even at the expense of the vindication of statutory rights."[63]

In cases involving lawful bargaining relationships where Congress has not determined the outcome of the accommodation analysis, the Supreme Court has refused to allow employers to rely on assertions of employees'

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[63] 362 U.S. at 429. By the same token, the Board has acknowledged employers' interests in maintenance of a status quo that has developed in the absence of timely action by the bargaining representative. Thus, for example, if more than 6 months pass after a union is on notice of an employer's refusal to execute a bargaining agreement, the Board will not entertain an 8(a)(5) charge on any continuing violation theory, since parties to a collective-bargaining relationship must "be able to assess their obligations to each other expeditiously and with reasonable certainty." *Chambersburg County Market*, 293 NLRB 654, 655 (1989).

rights to justify refusals to bargain. In *Brooks* v. NLRB,[64] the Court held that the employer was obligated to bargain with the certified union even if shortly after the election and through no reason attributable to the employer the union lost its majority support. After recognizing that the Board has proedures through which parties can petition the Board for release from their bargaining obligations, the Court stated:

> The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.. . .
>
> In placing a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers, Congress has discarded common-law doctrines of agency.[65]

In *Franks Bros. Co. v. NLRB*,[66] the Court affirmed the Board's Order that an employer bargain with a union which had lost its majority following the employer's unlawful refusal to bargain with it. The Court stated that such an order involves no "injustice to employees who

[64] 348 U.S. 96 (1954).
[65] 348 U.S. at 103.
[66] 321 U.S. 702 (1944).

may wish to substitute for the particular union some other . . . arrangement," because "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."[67] Similarly, in the situation where the Board has issued a bargaining order to remedy an employer's unfair labor practices, the argument has been made that a bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' Section 7 rights of free choice. The Supreme Court rejected this argument in *NLRB v. Gissel Packing Co.*[68] by pointing out that [t]here is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petion." And, in the situation where the Board issued an affirmative bargaining order because it found that a successor employer did not have a good-faith doubt of the incumbent union's majority status when the employer refused to recognize that union, the Fourth Circuit recently held that even though such an order "infringes upon" and "restricts employees' freedom of choice," such

[67] 321 U.S. at 705 (citations omitted). See also *NLRB v. Mexia Textile Mills*, 339 U.S. 563 (1950) (claim of an intervening loss of majority no defense to a proceeding for enforcement of an order to cease and desist from certain unfair labor practices).
[68] 395 U.S. 575, 613 (1969).

"a restriction does not ... render the remedy inappropriate," because "[i]t does not fix a permanent bargaining relationship between the employer and the union" and "[a]fter a reasonable period, the employees will be free to reject the union, if they so choose . . . ." *NLRB v. Williams Enterprises*, No. 94-1294, slip op. at 13-14 (4th Cir. Apr. 6, 1995).

In addition to Court precedent, Board decisions involving challenges to incumbent unions' status offer further guidance in analyzing, from a policy perspective, the limits on the Respondent's right to challenge the Union's majority status. In *Excel Corp.*, the Board refused to permit the decertification petitioners to submit signatures in support of their showing of interest after the expiration of the window period. The parties in *Excel* executed a successor agreement after the window period expired. Emphasizing that the parties had an enduring bargaining relationship, the Board found that to permit a decertification election based on untimely signatures would "unjustifiably place at risk the collective-bargaining agreement and the bargaining relationship between the Employer and the Union."[69]

In *W. A. Krueger Co.*, the Board held that an employer may not make unilateral changes in employees'terms and conditions of employment after a

[69] 313 NLRB at 589. Member Stephens, who dissented in *Excel Corp.*, and Member Cohen find it unnecessary to rely on the above discussion.

union loses the tally in a decertification election but before a certification of results issues. Although recognizing that an employer may act unilaterally at its peril in an initial certification where it has no preexisting duty to bargain,[70] the Board found that different interests prevail respecting a decertification petition, as it is filed in the context of an existing bargaining relationship where the employer has a duty to bargain over changes in unit employees' terms and conditions of employment. The Board found that its Rule-i.e., that election results are not final until a certification issues-promotes stability "while the Board determines whether the apparent employee choice was freely made."[71] Finally. the Board majority, in addressing the dissent's concerns that an employer might be compelled to bargain with a minority union, stated:

> [B]y referring to the confusion that can exist over a union's status and an employer's corresponding obligations, our colleague has inadvertently highlighted a compelling reason for establishing a date certain for a losing union's change in status.[72]

[70] See *Mike O'Connor Chevrolet-Buick-GMC*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

[71] 299 NLRB at 916-917.

[72] 299 NLRB at 918 fn 21. We note that the Board in *Krueger* relied on two decisions that similarly reflect the Board's interest in preserving existing bargaining relationships: *Dresser Industries*, 264 NLRB 1088 (1982) (Rule permitting an

From a policy perspective, then, the delineation of a precise point in time when a certified union's majority status ceases to be rebuttable promotes stability during the period when the union's status is in doubt.

The Supreme Court and the Board did not base these decisions on the certainty that the incumbent unions continued to represent a majority of the unit employees. Rather, these cases reflect the policy determination that bargaining relationships should remain
stable in the face of challenges to an incumbent union's status As both the Court and the Board have observed, this policy is particulariy compelling where, as here, the parties have maintained an enduring collective-bargaining relationship.[73]

We emphasize that the intent of these cases is not to impose bargaining relationships and representation on unwilling employees. However, the cases suggest that

employer to withdraw from bargaining solely because a decertification petition has been filed does not give weight to the incumbent union's continuing presumption of majority status); and *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982) (Rule that mere filing of a representation petition by an outside union does not require or permit an employer to withdraw from bargaining with an incumbent union furthers stable bargaining relations and insures employee free choice.)

[73] See. e.g., *Excel Corp.*, 313 NLRB at 588. See also *Krueger*, 299 NLLRB at 915-918.

with respect to *employers*, permissible methods of self-help to select and reject bargaining agents--in this case assertion of a good-faith doubt and attempted withdrawal of recognition-must be carefully circumscribed to prevent stable labor relations from being undermined by total employer control.[74]

Like we did in *Krueger*, we have established a date certain-a union's acceptance of an employer's contract offer-after which *an employer* cannot challenge the majority status of a certified union based on an aleged good-faith doubt. We believe that as a policy matter, the stability resulting from this principle outweighes its potential adverse impact on employee freedom of choice. We further believe that our policy choice stabilizes enduring bargaining relationships, and gives the bargaining agreement that was formed while the union' s presumed majority status remained unrebutted a chance to succeed.

[74] See *Brooks*, 348 U.S. at 103. Compare the Supreme Court's decision in *NLRB v. Curtin Matheson*, 494 U.S.at 794-796 (Board's refusal to adopt an antiunion presumption regarding the views of stike replacements is consistent with the Act's overriding policy of achieving industrial peace because it limits employers' ability to oust a union without adducing any evidence of the employees' union sentiments and encourages negotiated solutions to strikes).

L. *Cases Involving Extraordinary Circumstances*

We recognize that extraordinary circumstances may arise in which a union's acceptance of an employer's final contract offer and the employer's assertion of a good-faith doubt are simultaneous.[75] For example, employees may first present signed petitions stating that they do not want to be represented by a union at virtually the same time that the union accepts an employer's contract offer. In such infrequent instances, the Board will evaluate case by case whether an employer is permitted to raise a good-faith doubt of the union's majority status. Further, the possibility that an employer may be permitted to raise a good-faith doubt that developed contemporaneously with a union's purported acceptance of its offer does not affect the principle that a union and an employer are not permitted to continue bargaining if the union has actually lost its majority scatus and the employer and the union are aware of this actual loss.[76]

[75] Cf. Royal Coach Lines v. NLRB, 838 F.2d 47 at 54, in which the court, in the context of a discussion of the burden of proof in voluntary recognition cases, recognized the possibility that an employer might provide evidence to cast a serious doubt of majority support for the union immediately prior to or contemporaneous with voluntary recognition.

[76] See *S.M.S. Automotive Products*, 282 NLRB 36, 41-44 (1986); *Clark Equipment Co.*, 234 NLRB 935 (1978), on remand 249 NLRB 660 (1980). In the initial *Clark* decision, the Board found that the General Counsel established a prima facie case that the employer knowingly bargained with a union that had lost majority status. In so finding, the Board found that the evidence presented went beyond "naked claims" and included a specific listing of employees who had purportedly signed authorization cards for a rival union. No such arguments are made here. In the second *Clark* decision, however, the Board found that most of the key events established in the General counsel's prima facie case an relied on by the Board previouly did not, in fact, occur, an therefore that the employer did not violate the Act. Cf. *Quality Hardware Mfg. Co.*, 307 NLRB 1445 (1992). We further emphasize that the case before us does not involve allegations of an actual loss of majority status.

M. *Reconciling Curtin Matheson and Bickerstaff*

Finally, we find that tbe Board's decisions in *Curtin Matheson Scientific, Inc.*, 287 NLRB 350 (1987), and *Bickerstaff Clay Products Co.*, 286 NLRB 295 (1987), although they may appear to be inconsistent with our result here, do not indicate shifting or poorly defined Board policies. The Board's analyses of the cases before it are guided implicitly by the manner in which the cases are pled and litigated and, more explicitly, by the issues raised in the parties' exceptions. In both *Curtin Matheson* and *Bickerstaff* the parties did not litigate the timeliness of the employers' good-faith doubts even though they were asserted after the unions' acceptances of the respondents' outstanding contract offers. Instead, the parties framed

and argued the issue to the Board in both cases as whether the employers had met their burden of demonstrating a good-faith doubt. The focal point of each case in enforcement proceedings narrowed even more and became whether, in evaluating the employers' evidence, the Board should entertain the presumption that sniker replacements do not support the union.

The court in this case accepted the Board's insistence that it was not deliberately abandoning *Belcon* in considering the merits of the employers' good-faith doubts in *Curtin Matheson* and in *Bickerstaff*. Rather, the court characterized the Board's evaluation of the good-faith doubt defenses in those cases as "an unwitting oversight encouraged, perhaps, by a readiness . . .to secure review of an important substantive issue."[77] Although the resulting appearance of inconsistency is unfortunate, we agree with the court's assessment.[78]

N. *Conclusion*

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[77] 980 F.2d at 812.

[78] In *Curtin Martheson*, the Supreme Court reversed the Fifth Circuit's opinion and beld that the Board had acted within its discretion in refusing to adopt an antiunion in refusing to adopt an antiunion presumption regarding strike replacements. To the extent that the lower courts' opinions in *Curtin Matheson* and *Bickstaff* have not been overruled they are of limited precedential value.

We previously found that the Union's acceptance of the Respondent's outstanding contract offer on November 27 created a valid collective-bargainine agreement. The Respondent asserted a good-faith doubt for the first time on November 28, relying on events that occurred prior to the formation of the contract For all the reasons set forth above, we reaffirm our finding that the Respondent is precluded from demonstrating that it had a good-faith doubt of the Union's majority status at the time of acceptance. We therefore adhere to our previous findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a written contract with the Union and by withdrawing recognition.

ORDER

The National Labor Relations Board reaffirms its order in the underlying proceeding, 303 NLRB 562 (1991), and orders that the Respondent, Auciello Iron Works, Inc., Hudson, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

Dated, Washington, D.C. May 9, 1995

William B. Gould IV, Chairman

James M. Stephens, Member

Margaret A. Browning, Member

Charles I. Cohen, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals
For the First Circuit

NO. 91-1905

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
AUCIELLO IRON WORKS, INC.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
Selya, Circuit Judge
Campbell, Senior Circuit Judge,
and Keeton, * District Judge.

John D. O'Reilly, III, with whom O'Reilly & Grasso was on brief for respondent.

Collis Suzanne Stocking with whom Jerry M. Hunter, General Counsel, D. Randall Frye, Acting Deputy General Counsel, and Aileen A. Armstrong,

Deputy Associate General Counsel, were on brief for petitioner.

November 30, 1992

* Of the District of Massachusetts, sitting by designation

CAMPBELL, Senior Circuit Judge. The National Labor Relations Board petitions for enforcement of its order issued against Auciello Iron Works, Inc., on June 27, 1991, pursuant to section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). We decline to enforce the order at this time, retain jurisdiction and remand for further proceedings.

Background

Respondent, Auciello Iron Works, Inc. ("the Company") is an employer engaged in commerce within the meaning of sections 2(6) and (7) of the National Labor Relations Act ("NLRB"). The Company operates an iron fabrication shop in Hudson, Massachusetts, and employs approximately 23 production and maintenance workers. In 1977, the National Labor Relations Board ("NLRB") certified the Shopmen's Local Union No. 501, a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL-CIO) ("the

Union"), to be the exclusive collective bargaining representative of employees within a unit that included the Hudson facility's production and maintenance workers. Since 1977, the Company has negotiated and entered into several collective bargaining agreements with the Union.

On September 21, 1988, four days before the collective bargaining agreement then in effect was to expire, the Company and the Union began negotiations for a new agreement. The Union was represented in the negotiations by the International representative Robert Thomas, its local president David Mortimer, and one Joseph Parenti. The Company was represented by its attorney John D. O'Reilly, its controller Gerald Sauer, and its plant superintendent Manlio DeGrandis.

On September 30, 1988, the Company presented contract proposals and the parties discussed wages, medical insurance premiums and pension plans. Following the meeting, the Union's membership rejected proposals emerging from that meeting. Shortly thereafter, on October 4 or 5, 1988, representatives of the Company and the Union reviewed their respective positions. Thomas suggested to Company representative O'Reilly that if the Company would adopt the Union's contract proposal, there would be no need to submit it to the membership for a vote. Nothing came of this suggestion.

On October 13, 1988, the Company modified its proposals but the Union's negotiating team declined to accept them. It agreed, however, to submit the modified

offer to the membership without a recommendation. The membership voted to reject the Company's offer and to strike the next day.

The Company and the Union met on October 18, 1988 with a federal mediator. The Union made a proposal which the Company declined. The stalemate continued through the parties' next meeting on October 26, 1988.

On November 17, 1988, the Company and the Union met again with a mediator. The Company made oral proposals on wages, overtime and medical insurance premiums, and written proposals on grievance arbitration, supervisory performance of unit work, and management rights . The written proposals contained changes from the expired contract. The Union team requested that it be allowed to caucus in order to study the proposals. After doing so, it decided it needed more time to consider them. The team asked for an adjournment of the bargaining session. The mediator advised the Company's representatives of this request. The Union negotiators then left the negotiating room, neither rejecting nor otherwise responding to the Company's proposals. The Company took no action to withdraw its offer.

Three days later, on November 20, 1988, Thomas, for the Union, telephoned Company representative O'Reilly to ask if there was any point in meeting again. O'Reilly replied that he did not envision any change in the Company's position. O'Reilly reported Thomas' call to controller Sauer. Nothing was said on behalf of the

Company by way of withdrawing its November 17 proposals. After calling O'Reilly, Thomas telephoned Mortimer, the Union's local president, and informed him what had occurred. Thomas told Mortimer to advise the Union members to accept the Company's proposals of November 17 and to end the strike. Mortimer did so, and was able to reach eight to ten of the 23 employees.

On November 26, 1988, Mortimer reported to Thomas that the employees he polled had agreed to accept the Company's offer of November 17 and to return to work. On behalf of the Union, Mortimer sent the Company a telegram on November 27, 1988, stating:

> After careful consideration the proposed contract submitted by your company on November 17, 1988 to Local Union 501 has [been] unanimously ratified in its entirety by our negotiating committee. The strike at your plant has concluded as of this date and the employees have been advised to return to work on Monday November 28, 1988.

The Company's management representatives met to discuss their beliefs concerning the loyalties of various employees to the Union on November 28, 1988. After the meeting, the Company's attorney O'Reilly sent a telegram to the Union stating:

> Employer position in response to your notice of November 27 is as follows: 1. Employer offer of November 17, was rejected by Local 501 and is no longer open for unilateral acceptance. 2. In any event your claimed ratification limited to the negotiating committee and excluding rank and file membership is insufficient. Employer now has reason to believe that Local 501 no longer represents a majority of the employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations.

The strike ended as stated in the Union's telegram, but the Company refused to sign a contract with the Union based upon the November 17 proposals. The Union then filed an unfair labor practice charge and an amended charge with the NLRB against the Company on December 1, 1988, and January 17, 1989, respectively. In the charges the Union alleged that since November 28, 1988, the Company had refused to bargain with the Union in violation of section 8(a) (5) and (1) of the NLRA, by refusing to execute a collective bargaining agreement and by withdrawing recognition from the Union as bargaining agent for those unit employees.

The regional office of the NLRB issued an unfair

labor practice complaint on January 17, 1989. Hearings were conducted before an Administrative Law Judge ("ALJ"). Sauer, the Company's controller, testified that on November 17 the Union negotiators had "stormed out" of the negotiating room without responding to the Company's proposals. He and Thomas both conceded, however, that the Union had not expressly rejected the Company's proposals. Sauer further conceded upon Cross-Examination that the Company had not removed its proposals from the bargaining table on November 17.

On November 24, 1989, the ALJ issued a decision concluding that the Company's November 17 proposal was still outstanding when the Union accepted it on November 26, hence the Company's later refusal to sign an agreement based upon this proposal, and its withdrawal of recognition, were refusals to bargain in violation of section 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1).

The NLRB, without opinion, affirmed the ALJ's rulings, findings, and conclusions and substantially adopted his recommended order.[79] See Auciello Iron

[79] The Board stated in a footnote: We agree . that under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a respondent's alleged good-faith doubt of the union's majority status. Belcon, Inc., 257 NLRB 1341, 1346 (1981); North Bros. Ford, 220 NLRB 1021, 1022 (1975). We also agree with the judge that the Board's decision in Bickerstaff Clay Products, 286 NLRB 295 (1987),

Works, Inc., 303 NLRB No. 90 (1991). The Board ordered the Company to cease and desist from the unfair labor practices found, and required it, upon request of the Union, to put in writing, sign, and effectuate, retroactively to November 27, 1988, the collective bargaining agreement that the Union had accepted on that date. The order further required the Company to make whole, with interest, the employees to whom that agreement applied for lost wages and other benefits suffered as a result of the Company's refusal to execute the agreement.

The NLRB now seeks enforcement of that order.

A. Standard of Review

A court must enforce the Board's order if the Board correctly applied the law and if its findings of fact are supported by substantial evidence on the administrative record viewed as a whole. Destileria Serrales, Inc. v. NLRB, 882 F.2d 19, 21 (1st Cir. 1989). Substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 22 (1st Cir. 1983),

[enforcement denied], 871 F.2d 980 (11th Cir. 1989), in which the Board addressed the respondent's good-faith doubt defense even though the Board found that the parties had reached a binding agreement, did not overrule the precedent followed in Belcon.

cert. denied, 464 U.S. 892 (1983) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)).

A court of appeals reviews the NLRB's orders with considerable deference. NLRB v. Laverdiere's Enterprises, 933 F.2d 1045, 1049 list Cir. 1991). We will sustain inferences the Board reasonably draws from the facts, as well as its reasonable application of statutory standards to the facts and inferences. Soule Glass & Glazins Co. v. NLRB, 652 F.2d 1055, 1073 (1st Cir. 1981). We may not substitute our judgment for the Board's when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Universal Camera v. NLRB, 340 U.S. at 488.

B. The Duty to Bargain

Under NLRA § 8(a)(5) and (1),[80] an employer has the obligation to bargain collectively with the representative of its employees. Section 8(d) of the Act, 29 U.S.C. § 158(d), provides that the duty to bargain includes the duty to "execut[e] . . . a written contract incorporating any agreement reached if requested by

[80] These sections provide: (a) It shall be an unfair labor practice for an employer--(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title. 29 U.S.C. § 158(a)(1) and (5).

either party." An employer commits an unfair labor practice in violation of section 8(a) (5) and (1) of the NLRA by refusing to sign a writt... contract incorporating agreed-upon terms or by otherwise repudiating an oral agreement. NLRB v. Strong, 393 U.S. 357, 359, 362 (1969); H.J. Heinz Co. v. NLRB, 311 U.S. 514, 525-526 (1941); NLRB v. Crimptex, Inc., 517 F.2d 501, 505-06 (1st Cir. 1975).

The Company argues that in the circumstances of this case it did not commit an unfair labor practice by refusing to sign a collective bargaining agreement based on the Union's acceptance on November 27 of its November 17 offer, and by withdrawing recognition from the union. It contends that the offer made on November 17 was no longer available when the Union's negotiating committee accepted it; that the committee's acceptance never resulted in a binding agreement because the Union's membership never ratified the purported agreement; and that the Company properly withdrew recognition from the Union because it believed, in good faith, founded on reasonable and objective factors, that the Union, in fact, clearly no longer represented a majority of the unit employees. We consider these arguments in turn.

II.

A. Whether the November 17 offer was still available when the Union accepted it

Although not bound by all the technical rules of contract law, the NLRB is free to fashion and apply general contract principles in the collective bargaining context. NLRB v. International Bhd. of Elec. Workers Local 22, 748 F.2d 348, 350 (8th Cir. 1984); Pepsi-Cola Bottlina Co. v. NLRB, 659 F.2d 87, 89 (8th Cir. 1981); NLRB v. Electra-Food Mach., Inc., 621 F.2d 956, 958 (9th Cir. 1980). The Board and courts have held that "[i]n the collective bargaining context, an offer will remain on the table unless the offeror explicitly withdraws it or unless circumstances arise that would lead the parties to reasonably believe that the offeror has withdrawn the offer." NLRB v. Burkart Foam. Inc., 848 F.2d 825, 830 (7th Cir. 1988); see Williamhouse-Resency, Inc. v. NLRB, 915 F.2d 631, 634-635 (11th Cir. 1990).

Here the ALJ, in findings affirmed by the Board, found "neither evidence nor contention" of express withdrawal by the Company prior to the Union's November 27 acceptance. Similarly, the AU found that nothing in the Company' s or Union's conduct or reaction prior to the Union's November 27 acceptance suggested that the parties believed, or had reason to believe , the offer of November 17 had been rejected, withdrawn or ceased to be open for acceptance.

We accept these findings as they are amply supported by substantial evidence in the record. The Company contends that the Union delegation's "storming out" of the November 17 meeting without setting another

meeting date or saying farewell was an "extremely negative response" which led management to infer a rejection of its proposal. However, the absence of any reference to withdrawal or rejection of the proposal in conversations between Thomas and O'Reilly on November 20 caused the ALJ to doubt that the employer believed its proposals had been rejected. In factual matters of this nature, we defer to the Board's resolution. The ALJ also thought, we think reasonably, that a mere uncommunicated, unilateral judgment by the Company that rejection had occurred would, by itself, be ineffective to remove its proposal from the table. We find no error. The Board acted well within its authority in finding that the offer of November 17, 1988, was still on the table when the Union's negotiating committee purported to accept it by telegram on November 27, 1988.

B. Ratification

The Company argues that no valid contract was ever entered into with the Union because the Union negotiating committee's acceptance of the November 17 proposal was never ratified by the Union members. The ALJ, in an analysis adopted by the Board, rejected this contention, finding that there was no express or implied mandate or agreement making membership ratification a precondition to a binding collective bargaining contract.

The NLRB has consistently held that unless parties have explicitly agreed that any agreement between the negotiators must be ratified by the employees, the

formality of a vote is not required to create a binding agreement. Newtown Corp., 280 NLRB 350 (1986), enforced, 819 F.2d 677 (6th Cir. 1987); Consumat Sys., Inc., 273 NLRB 410, 413 (1984); Martin J. Barry Co., 241 NLRB 1011, 1013 (1979), later proceeding, 278 NLRB 393 (1986); see also Houchens Mkt., Inc. v. NLRB, 375 F.2d 208, 212 (6th Cir. 1967) ("[W]hether or not [the] bargaining unit may enter into a binding contract with or without membership ratification . . . is not an issue which the Company can insist upon without mutual agreement by the Union .")

The ALJ found, and it is undisputed, that neither the Iron Workers' International constitution nor the by-laws of the local union contain any provision requiring membership ratification of a collective bargaining agreement. The ALJ also found that there were no explicit discussions between the Company and the Union during the 1988 negotiations in which the Union advised the Company that membership ratification was needed to establish a contract. While there was evidence that membership votes were taken in 1988, and possibly before, the ALJ concluded, and the Board agreed, that such submission to membership votes fell short of establishing that ratification was a pre-condition to the formation of a binding agreement. While another determination might be possible, we think this conclusion was within the authority of the Board to reach on this record.

C. The Company's good faith belief that the Union no longer represented the majority of employees as a basis to withdraw recognition from the Union

The Company's most serious contention is that the Board erred in refusing to consider the Company's argument that, in declining to recognize the Union or to bargain further with it, the Company was acting pursuant to a well-supported good faith doubt that the Union still had majority support among those it supposedly represented. The Company first made this contention in a telegram sent on November 28, one day after the Union's negotiating committee had telegraphed its acceptance of the Company's outstanding offer of November 17. The Company points to various facts, all of which apparently occurred prior to the negotiating committee's November 27 acceptance, as indicative of the Union' s loss of majority support. Among other things, the Company asserts that some nine unit employees crossed the picket line on a daily basis during the strike; that as many as 13 of the original bargaining unit personnel had submitted resignations to the Union; and that 16 original unit employees had indicated that they did not support the Union.

The ALJ, however, refused to consider whether or not the Company's alleged good faith doubt, manifested on November 28, was justified by evidence indicating the Union had, in fact, lost majority status. He relied upon the Board's decision in Belcon. Inc. , 257

NLRB 1341 (1981) , for the proposition that, once a union has accepted the employer's contract offer, thus establishing a binding contract between the parties, the employer may not decline to bargain with the union under the terms of the contract on grounds of a good faith doubt of majority status.

The Board confirmed the ALJ' s determination, reiterating its support for the Belcon doctrine. See supra note 1. The Board's position, which it reiterated in its argument before us, goes back to NLRB decisions rendered in the 1970s: North Bros. Ford. Inc., 220 NLRB 1021 (1975), and Utility Tree Serv., Inc., 215 NLRB 806 (1974), supp. op., 218 NLRB 784 (1975), enforced, 539 F.2d 718 (9th Cir. 1976). In North Bros. Ford, the Board ruled that once a "final agreement on the substantive terms [of the collective bargaining agreement is] reached, and regardless of the status of any written instrument incorporating that agreement, [the employer is] not free to refuse to bargain even if it has lawful grounds for believing that [the Union] has subsequently lost its majority status." North Eros. Ford, 220 NLRB at 1022.

Underlying the Board's rationale is the so-called contract bar rule, a Board-created rule that once an employer and a union enter into a valid collective bargaining contract, the majority status of the union is presumed for the duration of the contract, not to exceed three years. El Torito-La Fiesta Restaurants. Inc. v. NLRB. 929 F.2d 490, 492-93 (9th Cir. 1991); Pioneer

Inn Assocs. v. NLRB, 578 F.2d 835, 838 (9th Cir. 1978). The rule has been applied by the Board to prevent challenges to a union's majority status "even if a majority of the employees withdraw their support." Pioneer Inn Assocs.,578 F.2d at 838.

In North Bros. Ford, the employer's good faith doubt centered on the union's loss of majority status occurring after the making of the contract. See 220 NLRB at 1021-22. Belcon was not expressly so limited, however, see 257 NLRB at 1346-47, and in cases like the present, the Board apparently believes that even if the Union lacked majority status at the very moment its negotiating committee accepted the employer's offer, a completed contract should be presumed, barring the employer from thereafter questioning the union's lack of majority support. Chicago Tribune Co. , 303 NLRB No. 106 (1991) ,enforcement denied, 965 F.2d 244 (7th Cir. 1992).

There is an obvious chicken-egg problem in this approach. If the Union in fact lacked majority status at the time of acceptance, should its acceptance be held to create a valid and binding contract that bars the employer from thereafter questioning the existence of majority status at that critical earlier time? The closest thing to a relevant justification of the Board's approach appears in the ALJ's opinion (subsequently reversed by the Seventh Circuit) in Chicago Tribune. The ALJ wrote:

> There is no reliable authority for the proposition that an employer may invoke a refusal to bargain or withdrawal of recognition after a contract has been reached. Good faith doubt is a difficult enough concept to litigate when alleged doubts are expressed in the form of a refusal to bargain; it would be an impossible concept to litigate if it could be invoked after a contract is reached and in the absence of a prior refusal to bargain not only to vitiate that contract but to dissolve the bargaining relationship. This would permit an employer to litigate an alleged doubt as it might have existed in his own mind at the time a contract was reached rather than at the time of an objective event, that is, a refusal to bargain or withdrawal of recognition. The cases do not permit such a subjective inquiry.

The Board in Chicago Tribune proceeded on the basis of the ALJ's opinion, without attempting any further explanation of its own. In briefs and argument before us, Board counsel made no mention at all of the decisions so far rendered in Chicago Tribune, and neither the ALJ nor the Board here have attempted to address the employer's

argument that the contract bar rule should not be applied to prevent an employer from attempting to question the very existence and validity of a contract for lack of majority status.

Even more troublesome, after argument in April 1992, neither party advised us that, on May 29, 1992, the Seventh Circuit had refused to enforce the bargaining order in Chicago Tribune. Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992), reh'g denied, Nos. 91-2750, 91-2916, 1992 U.S. App. LEXIS 14485 (June 24, 1992). The Seventh Circuit's analysis has direct bearing here. Writing for the panel, Judge Posner refused to accept "the Board' s rule that a union' s unconditional acceptance of an offer for a collective bargaining contract is valid and binds the company unless circumstances have changed since the company's offer was made or renewed . where between the original offer and its renewal the union lost the support of the workers." Chicago Tribune, 965 F.2d at 250. The Seventh Circuit reasoned that while the employer might have been at fault for leaving its offer on the table, the interests of the unrepresented majority-- who had not desired representation by the union at the time the contract was supposedly agreed to could not properly be sacrificed to the interests of the repudiated union and to whatever considerations might support holding that the employer had waived his rights. See id. The Seventh Circuit relied upon International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961),

forbidding a company to sign a collective bargaining contract with a union that it knows does not have the support of a majority of the workers in the bargaining unit. See Chicago Tribune, 965 F.2d at 249-51.

In their briefs and argument before us, the parties did not explore to any degree the pros and cons of applying the contract bar rule against an employer on the basis of a contract made by a union that, at the time it accepted the employer's offer, may have lacked majority support . The Company raised the point, however, noting that in North Bros. Ford the loss of support had occurred only after the making of the contract and, on that basis, arguing for release from the contract bar rule.

We find disappointing the Board's failure to recognize that the mere rote citation of North Bros. Ford and Belcon does not answer the Company's contention. The Board seems to have mechanically applied what Judge Posner aptly terms, "the beguiling syllogism: an offer not withdrawn can be accepted at any time provided there are no changed circumstances; an agreement once accepted must be signed: a signed agreement creates an irrebuttable presumption that the union has majority support . " 965 F.2d at 250 (citations omitted). The Board has glossed over the analytically tough question presented here: should the making of a contract be irrebuttably presumed for purposes of the contract bar rule where the creation of the alleged contract, by the union's acceptance of the employer's offer, may have

come at a time the union lacked majority support? The ALJ in Chicago Tribune believed it would be impracticable not to presume a valid contract even in those circumstances. The Seventh Circuit held, to the contrary, that that approach conflicted with the firmly established principle that an employer may not contract with a minority union. See 965 F.2d at 250.

The National Labor Relations Board has the chief responsibility for developing coherent and correct labor negotiating rules. Especially as the relevant principles here are informed less by statutes than by Board policies set out in its decisions, the area is one where the Board's presumed expertise is key. Yet the Board cannot provide meaningful leadership through rote, unthinking, unexplained applications. The fitful quality of the Board's attention in the instant area was shown in two recent cases cited here by the Company, in which the Board appears to have overlooked altogether its North Bros. Ford and Belcon precedent. In enforcement proceedings culminating in NLRB v. Curtin Matheson Scientific. Inc., 494 U.S. 775 (1990), and NLRB v. Bickerstaff Clay Prods. Co., 871 F.2d 980 (11th Cir. 1989), cert. denied, 493 U.S. 924 (1989), the Board, without comment, allowed an employer to litigate an issue of good faith doubt after the union had accepted an outstanding offer. Without mentioning the Belcon doctrine, the Board plunged into the merits of the employer's asserted good faith doubt. See Curtin Matheson Scientific, Inc., 287

NLRB 350 (1987), enforcement denied, 859 F.2d 362 (5th Cir. 1988), rev'd, 494 U.S. 775 (1990); Bickerstaff Clay Prods. Co., 286 NLRB 295 (1987), enforcement denied, 871 F.2d 980 (11th Cir. 1989) , cert. denied, 493 U.S. 924 (1989) . The Board now suggests various reasons for its oversight in those cases, insisting that it was not deliberately abandoning Belcon. We accept the Board's insistence as true. We are not persuaded by the Company's arguments that Belcon was knowingly abandoned or that the Supreme Court, in Curtin Matheson, tacitly overruled it. What occurred looks like an unwitting oversight encouraged, perhaps, by a readiness to circumvent precedent in order to secure review of an important substantive issue. But the course taken does not reflect much credit on the Board Employers and unions are entitled to expect an even-handed application of the rules announced in the Board' s prior administrative decisions. If the Board and its General Counsel do not remember and follow Board precedent, how can others be expected to do so? And if, when the Board undertakes to apply its precedent, it does so, as here, without bothering to explain applications in factually distinguishable circumstances, it weakens the credibility of its policies.

The Board's conclusory ruling in the present case simply failed to address the argument that acceptance of an outstanding offer by a minority union should not be deemed to establish a valid collective bargaining

agreement that forever bars the employer from raising a good faith doubt. The Board nowhere addressed the Company's argument that a lack of majority status on the date the Union purported to accept the Company's outstanding offer should be distinguished from a good faith doubt of majority status based on events occurring after a valid contract was made. Can acceptance by an unrepresentative minority union create a binding contract?[81]

Particularly in light of the Seventh Circuit's decision in Chicago Tribune, we think the Board must revisit, clarify and explain the principles that it thinks apply in the present circumstances. We do not say its ultimate result need necessarily be different from what it was here. We are not ready to say that the Seventh Circuit's analysis should apply, nor, indeed, that we adopt the Seventh Circuit's holding in Chicago Tribune. This is an area where the courts should tread softly, with considerable deference to the Board's reasoned analysis. In the practical arena of labor negotiations, the Seventh Circuit's analysis may still be found wanting as a yardstick. But the Board, by default, has left us without the policy guidance and reasoned analysis needed to decide the issue. The question is not a purely legal one, but calls for the Board's

[81] We do not, of course, say that the Union necessarily lacked majority support here. The ALJ expressly refrained from making findings as to that issue, relying instead on the contract bar rule to prevent the employer from raising the matter

reasoned application of its expertise. Reviewing courts are entitled to have that expertise demonstrated in a meaningful Board opinion, rather than in a laconic rule of thumb presented without reasoning and without attention either to the employer's arguments or to underlying policy concerns (such as the attention due to the rights of unrepresented workers).

A court may require that the Board's decision "be supported by articulate, cogent, and reliable analysis." Northport Health Servs., Inc. v. N.L.R.B., 961 F.2d 1547, 1553-54 (11th Cir. 1992); accord Williams Enters., Inc. v. N.L.R.B., 956 F.2d 1226, 1235-36, 1240 (D.C. Cir. 1992); Hyatt Corp. v. N.L.R.B. 939 F.2d 361, 367'68, 376 (6th Cir. 1991); Pacific Northwest Newspaper Guild. Local 82 v. N.L.R.B., 877 F.2d 998, 1001-03 (D.C. Cir. 1989); Teamsters Local Union 171 v. N.L.R.B., 863 F.2d 946, 957-59 (D.C. Cir. 1988), cert. denied sub nom. A. G. Boone Co. v. N.L.R.B., 490 U.S. 1065 (1989); Hotel Holiday Inn de Isla Verde v. N.L.R.B., 723 F.2d 169, 172-73 (1st Cir. 1983).

Accordingly, while we shall retain jurisdiction, we remand to the Board for its further consideration.[82] We direct the Board to hear additional argument from the

[82] Under the statute granting this court jurisdiction to entertain petitions for enforcement of Board orders, the court has the "power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting

parties on the principles to be applied where, after the Union's supposed acceptance, an employer seeks to present evidence that at the time of the Union's acceptance, it lacked majority support. Following argument, the Board should issue a reasoned opinion stating the appropriate rule or rules it proposes to apply, and resolving that question here in accordance with those articulated principles. As we have said, the Board's result may or may not be the same as before. However, the Board's opinion should include a discussion of the Seventh Circuit's ruling in Chicago Tribune, and of the legal and policy principles (as well as practicalities) it believes are controlling, and of the application of those considerations to the facts, While we set no specific time limit, we ask the Board to act with expedition, and to send a certified copy of the record and its opinion and further order to the clerk of this court as soon as it can.[83]

aside in whole or in part the order of the Board." 29 U.S.C. § 160(e). This power has been applied to authorize remand to the Board for further proceedings pursuant to the court' s opinion while retaining jurisdiction. See, e.a., N.L.R.B. v. New York Univ. Medical Ctr., 702 F.2d 284, 299 (2d Cir. 1983) (remanding to Board, while retaining jurisdiction, for application of proper legal standard), vacated on other grounds, 464 U.S. 805 (1983); N.L.R.B v. Mount Desert Island Hosp., 695 F.2d 634, 642 list Cir. 1982); New Alaska Dev. Corp. v. N.L.R.B., 441 F.2d 491, 495 (7th Cir. 1971) (retaining jurisdiction and remanding for required detailed factual findings).

[83] In the event the Board determines that further

For the sake of clarity, we reiterate that we are prepared to enforce the Board's determinations, (a) that the Company's offer remained open and "available" on November 27, when the Union purported to accept it; and (b) that membership ratification Per se was not a requirement. Our doubt focuses on whether and why the employer should not be allowed to try to show that, at the time of the Union's purported acceptance of the Company' s outstanding offer, the Union was lacking in majority support and therefore incapable of creating by its acceptance a valid contract.

We decline to enforce the order at this time, and the cause is remanded to the Board for further Proceedings consistent herewith, with jurisdiction to be retained by this court.

Adm. Office, U.S. Courts - Blanchard Press, Inc., Boston, Mass.

fact-finding is required, necessitating a remand to the ALJ, we direct the Board to notify us to this effect and authorize the Board to then move to terminate our retained jurisdiction over the present enforcement petition.

CDO

303 NLRB No. 90

D--2090

Hudson, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

AUCIELLO IRON WORKS, INC.

and

Case 1--CA--25969

SHOPMEN'S LOCAL UNION NO. 501 a/w INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS (AFL--CIO)

DECISION AND ORDER

On November 24, 1989, Administrative Law Judge Norman Zankel issued the attached decision. The Respondent filed exceptions and a supporting brief,[84] and

[84] On May 3, 1990, the Respondent filed a motion to file a supplementary memorandum of law on the applicability and

the General Counsel resubmitted his brief to the judge in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions [85] and to adopt the recommended Order.

impact of the U.S. Supreme Court's decision in NLRB v. Curtin Matheson Scientific, Inc., 110 S.Ct. 1542 (1990). The Board granted this motion on May 8, 1990, stating that all parties could file such briefs. Only the Respondent filed a supplementary memorandum of law.

[85] We agree with the judge that under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a respondent's alleged good-faith doubt of the union's majority statue. Belcon, Inc., 257 NLRB 1341, 1346 (1981); North Bros. Ford, 220 NLRB 1021, 1022 ~1975). We also agree with the judge that the Board's decision in Bickerstaff Clay Products, 286 NLRB 295 (1987), enf. denied 871 F.2d 980 (11th Cir. 1989), in which the Board addressed the respondent's good-faith doubt defense even though the Board found that the parties had reached a binding agreement, did not overrule the precedent followed in Belcon.

In agreeing with his colleagues that it is unnecessary to consider the issue of good-faith doubt, Member Oviatt relies on the fact that the Respondent not only failed to withdraw its offer prior eo the Union's acceptance but that it did not immediately

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ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Auciello Iron Works, Inc., Hudson, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

Dated, Washington, D.C. June 27, 1991

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

communicate to the Union its "good-faith doubt" that the Union had lost ire majority status. He notes parenthetically that to allow a proposal to remain on the bargaining table after the Respondent has e good-faith doubt as to the Union's majority status may be tantamount to bargaining with a minority union---and thus could leave the Respondent vulnerable to a Sec. 8(a)(2) charge.

D--2090

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully withdraw recognition from, or refuse to bargain with, Shopmen's Local Union No. 501 a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL--CIO) as the

exclusive collective bargaining representative of employees in the following appropriate unit:

All production and maintenance employees, including working foremen, engaged in the fabrication of iron, steel, metal, and other products, or in maintenance work in or about the vicinity of our Hudson, Massachusetts facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act (except working foremen).

WE WILL NOT fail and refuse to sign and implement the collective-bargaining agreement which has been found to have been created on November 27, 1988.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the above-named Union, put in writing, sign, and put into effect, retroactively to November 27, 1988, the collective-bargaining agreement which the Union accepted that date.

WE WILL make whole, with interest, all employees to whom the November 27, 1988 collective-bargaining agreement applies, for all lost wages and other benefits they may have suffered as a result of our failure to sign an

agreement containing our November 17, 1988 proposals and from our withdrawal of recognition from the Union on November 28, 1988.

AUCIELLO IRON WORKS, INC.
(Employer)

Dated_____By_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10 Causeway Street, Sixth Floor, Boston Massachusetts 02222-1072, Telephone (617)-565-6739.

JD-287-89
Hudson, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON D. C.

AUCIELLO IRON WORKS, INC.

and

SHOPMEN'S LOCAL UNION No.501 a/w
Case No. 1-CA-25969
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS
(AFL-CIO)

Avrom J. Herbster, Esq., of Boston, MA
for the General Counsel

John D. O'Reilly, III, Esq..,
O'Reilly and Grosso, of
Framingham, MA for the Employer

Mr. Robert Thomas, General Organizer,
of Smithfield, RI for the Union

DECISION

NORMAN ZANKEL, Administrative Law Judge: This case was tried before me on June 21 and August 8 and 9, 1989 at Boston, Massachusetts upon a Complaint and Notice of Hearing issued on January 20, 1989 by Michael R. Walsh, Esq., Acting Regional Director for the First Region of the National Labor Relations Board (the Board).

The Complaint, based on a charge and an amended charge filed on December 1, 1988[86] and January 17, 1989, respectively, alleges that Since on or about November 28 the Employer refused to bargain with the Union as exclusive collective-bargaining representative of an appropriate unit of employees[87], in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act), by refusing to execute a written collective-bargaining agreement and by withdrawing

[86] All dates hereafter are in 1988, unless otherwise indicated.

[87] I granted General Counsel's oral motion at the hearing to amend the Complaint so the unit description would read: "All production and maintenance employees (as defined in Section 1 of the [parties'] 1985-1988 contract) employed by the Employer at its Hudson, Massachusetts facility, but excluding all office clerical employees, guards and supervisors as defined in the Act."

All parties agree this unit is appropriate for collective-bargaining. I so find.

recognition from the Union as bargaining agent for those unit employees.

The Employer filed a timely Answer to the Complaint. The Answer admitted certain allegations, but denied the Employer committed the alleged
unfair labor practice.

All parties were given full opportunity to produce relevant evidence through witnesses and documents; to examine and cross-examine witnesses; and to make oral arguments. Post-hearing briefs were timely received from Counsel for the General Counsel and counsel for the Employer. Based upon my observation of the conduct and demeanor of the witnesses, and the record as a whole, I make the following:

Findings and Conclusions

I. Jurisdiction

Jurisdiction is uncontested. The Employer, a corporation engaged in business as a metal fabricator, has had an office and place of business in Housing, Massachusetts at all material times. During the calendar year immediately before Complaint issuance, the Employer sold and shipped products, goods and materials exceeding $50,000 in value from its Housing facility directly to points outside of Massachusetts; and, in the same period and at the Housing facility, purchased and received products,

goods and materials exceeding $50,000 in value directly from points outside of Massachusetts.

The Employer admits, the record reflects, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

All parties agree, the record reflects, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Issue

Did the September-November, 1988 collective bargaining negotiations between the Employer and Union result in an agreement to which they were bound and which precluded the Employer from lawfully withdrawing recognition from the Union based upon an assertion of good-faith doubt of the Union's majority status?

I shall find a collective-bargaining agreement between the Employer and Union came into existence on November 27, 1988 and that, consequently, the Employer's admitted November 28 withdrawal of recognition from the Union was unlawful.

I find the stated question encompasses the principal, and dispositive, issue of the instant case. As noted above, the Employer admitted it withdrew recognition from the Union. But the Employer asserts that action was based upon objective considerations which caused it to have a good-faith doubt of the Union's majority status. Both

Counsel for the General Counsel and for the Employer vigorously, and fully, litigated the sufficiency and timeliness of the withdrawal of recognition.

In view of my disposition of the principal issue, I conclude no useful purpose would be served by a discussion and analysis of the good-faith doubt issue. See Belcon, Inc., 237 NLRB 1341, 1346 !1981) where the Board left undisturbed Judge Myatt's explicit conclusion it is unnecessary to deal with that issue in situations where the facts establish a union's acceptance of collective-bargaining proposals before an employer withdraws its offer[88].

III. The Alleged Unfair Labor Practice[89]

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[88] I am mindful that Bickerstaff Clay Products, Co., Inc., 286 NLRB No. 27 (1987), enf. den. 871 F.2d 980 (11th Cir. 1989), in which the Board held an acceptance which preceded offer withdrawal established a binding agreement, contains Judge Robertson's and the Board's treatment of the good-faith doubt issue. No reason for such discussion in Bickerstaff is apparent.

Inasmuch as the Board, in Bickerstaff, did not overrule well-established precedent holding irrelevant an employer's good-faith doubt of union majority status once agreement on a contract's substantive terms has been reached (North Bros. Ford, Inc., 220 NLRB 1021, 1022 (1975); Utility Tree Service, Inc., 215 NLRB 806, 807 (1974)). I consider it proper, in all the instant circumstances, to eliminate the good-faith doubt issue from my further consideration.

[89] The operative facts are substantially undisputed. Where

A. Background

The Board certified the Union as the exclusive collective-bargaining representative of the employees within the appropriate unit described in footnote 2, above, in 1977. Since that time, the Union and Employer negotiated four successive collective bargaining agreements which applied to those unit employees. The most recent of those contracts was due to, and did, expire on September 25, 1988.

Generally, the relationship between the contracting parties was uneventful through the years. The Union conducted no strikes and pursued no grievances or arbitrations until the instant dispute.

B. Scenario of the Present Dispute

The Employer and Union began negotiations for a new collective-bargaining agreement on September 21. Robert Thomas, International Representative/General Organizer; Local Business Agent (then Local President), David Mortimer; and Steward Joseph Parenti comprised

material variations exist, they shall be resolved. My description of facts in this, Section III of the decision, is a composite of undisputed testimony, documentary evidence and stipulations. Not all evidence, or argument based on it, is reported. Omitted matter is deemed irrelevant, superfluous or of no probative value to the principal issue.

the Union's negotiating team. Attorney John D. O'Reilly III; Gerald C. Sauer, the Employer's Controller; and Plant Supervisor Manlio DeGrandis were the Employer's team. The Union presented its written proposal for a new contract. Some agreements, characterized as preliminary, were reached but major substantive subjects remained unresolved.

The next bargaining session occurred on September 30. The Employer presented its written contract proposals. Extensive discussion ensued regarding wages, medical insurance premiums and pension plan. There is disagreement among Thomas, Mortimer and Sauer as to whether or not the negotiators reached total agreement on a new contract's terms during this session. This disagreement need not be resolved. I find it irrelevant because it is undisputed that a vote among the Union membership was taken immediately following the bargaining session that day, and whatever was presented to them had been rejected.

The negotiating teams again met on October 4 or 5.[90] They reviewed their respective positions upon the contract issues. At one point, Thomas met privately with attorney O'Reilly. Thomas testified (without contradiction) he suggested that if the Employer, in effect, would adopt a Union contract proposal as its own, there would be no need for the negotiating committee to submit the proposal to the

[90] Thomas testified the meeting was on October 4. Sauer claimed it was on the following day. There is no need to resolve this difference.

Union membership for a vote. O'Reilly did not accede to this suggestion.

Another negotiating session was held on October 13. The Employer modified its proposal on health insurance premiums to address the apparent reason for membership rejection on September 30, but also reduced its wage proposal. The Union negotiators said they. could not agree to these proposals but nonetheless would submit them to a membership vote, at a meeting already scheduled for that evening, without a recommendation for acceptance.

At that evening's Union meeting, the Union membership voted to reject the Employer's October 13 proposal, and voted to strike. A strike began on October 14.

On October 18, the negotiating teams met in the presence of a federal mediator. The Union made another proposal for medical insurance premiums and wages. The Employer's bargaining team made no commitment concerning those proposals. The parties met again on October 26, but no progress was made toward agreement upon a new contract.

On November 17, the negotiating teams met. The mediator was present. The Employer presented numerous proposals. Oral proposals were made on medical insurance premiums, wages and overtime. Written proposals were made which related to grievance arbitration, supervisory performance of bargaining unit work, and management rights. The written proposals contained extensive changes

in provisions of the recently-expired collective-bargaining agreement.

The Union team requested a caucus to study the proposals. Upon examination, the team decided more time was needed. They asked for adjournment of that bargaining session. The mediator advised the Employer's team of this request. Sauer testified the Union negotiators "stormed by" the Employer's team. Thomas and Sauer agree the Union did not expressly reject the Employer's November 17 proposals; and Sauer, during his Cross-Examination, acknowledged that the Employer had not removed those proposals from the bargaining table on that date.

On or about November 20, Thomas telephoned attorney O'Reilly. Thomas asked whether there would be any advantage to sitting down and negotiating to arrive at an agreement. O'Reilly said he did not envision any change in the Employer's position. There is no evidence to show either that Thomas said the Union rejected the Employer's November 17 proposals or that O'Reilly said those proposals had been withdrawn. Sauer testified O'Reilly reported this telephone conversation to him but Sauer, even then, acknowledged no instructions were given to O'Reilly to withdraw the proposals.

After his November 20 conversation with O'Reilly, Thomas telephoned Mortimer and instructed him to contact the employees, inform them what occurred, and recommend they accept the November 17 proposals and

end the strike. Mortimer complied. Mortimer testified he reached 8-10 employees.

On November 26, Mortimer reported to Thomas that the employees he polled agreed to accept the November 17 proposals and return to work.

On November 27, Thomas sent a telegram, signed with Mortimer's name, to Auciello, as follows:

> "After careful consideration the proposed contract submitted by your company on November 17 1988 to Local Union 501 has (sic) unanimously ratified by our negotiating committee. The strike at your plant has concluded as of this date and employees have been advised to work on Monday November 28, 1988."

Auciello received the Union's telegram on November 27. The next day, O'Reilly telegraphed the Union, stating:

> "Employer position in response to your notice of November 27 is as follows: 1. Employer offer of November 17 was rejected by Local 501 and is no longer open for unilateral acceptance. 2. In any event your claimed ratification (sic) limited to negotiating (sic) committee and excluding rank and file membership is insufficient. Employer now has reason to believe that Local 501 no longer

represents a majority of employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations."

The strike ended as stated in the Union's November 27 telegram, but the Employer has remained steadfast in its refusal to sign a collective-bargaining agreement containing the terms of the Employer's November 17 proposals and in its withdrawal of recognition from the Union.

C. Analysis

(1) The Ratification Issue

The Employer, in part, contends that ratification of negotiated contract terms by the applicable bargaining unit employees was a pre-condition to the fornication of a collective-bargaining agreement with the Union. The General Counsel argues that the instant circumstances show ratification was not a requirement for an enforceable agreement to come into existence.[91]

[91] The Employer also urges that, even if ratification were not needed to establish a contract, the offer which the Union purportedly accepted had been withdrawn prior to acceptance. This argument will be addressed further below.

The evidence regarding past practice of ratification, and what was said and done in that connection during the 1988 negotiations is critical to resolution of this case. Thomas and Mortimer testified with respect to ratification practices with the Employer. Ralph duciello, Employer's vice-president for Production, and Sauer, testified as to the Employer's perspective of ratification. I credit the testimony of each of these witnesses, especially respecting ratification. Each of them vas direct, forthright and candid. The relevant evidence regarding ratification follows.

It is undisputed that neither the Ironworkers' International Constitution nor the by-laws of the Local Union contains any provision regarding ratification of collective-bargaining agreements. Mortimer acknowledged the terms agreed-to at the bargaining table in each of the three previously-negotiated contracts were submitted by the Union's negotiating committee to the membership for a vote, He said the agreements were ratified "as a matter of course".

Thomas explicitly denied the Union negotiators ever told their Employer counterparts that membership ratification was needed "before there would be a final contract" during the 1988 negotiations (Tr.26). He was unchallenged in that connection.

Auciello initially testified, in general terms, that the "Union committee always stated that they must have a ratification of the men" (Tr.162). During Cross-Examination, however, Auciello explained that he

had not personally participated in the negotiations, but relied upon Sauer for reports. Then, Auciello conceded that Sauer did not inform him that the Union negotiators said that ratification was needed before the parties had an agreement. Instead, Auciello testified he had been advised the Union committee was going to make recommendations to the membership for a vote, and that was consistent with past practice.

Sauer, referring to the negotiations conducted in years before 1988, was asked and answered questions as follows, during his direct examination:

> "Q. Did they (the Union) reach agreement with your committee across the table and then express a need to have that agreement ratified?
>
> A. That is correct
>
> Q. And did they, in fact, go through the ratification process in each of these negotiations?
>
> A. Yes, they had...
> Q. And did they, subsequent to the ratification process, report back to management the results of the ratification vote?
>
> A. That is true." (Tr. 392).

Regarding the 1988 negotiations, Sauer (during his direct examination) testified that "...after we reached an agreement with the Union...Mr. Thomas said that they had to go back and have the agreements that we have made across the table ratified by the rank and file" (Tr. 393). However, during Sauer's Cross-Examination, he conceded that Thomas "...did not say if there wasn't ratification there would be no contract" (Tr. 420).

In sum, I find the ratification evidence shows:

a. no written mandate existed which required proposed collective bargaining agreements to be submitted to Union membership votes before those agreements could become binding;

b. no explicit discussions occurred between the Employer and Union during the 1988 negotiations by which the Union told the Employer that membership ratification was needed to establish a contract;[92]

c. the evidence that the Union submitted contract terms to membership votes in negotiations before

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[92] Indeed, I conclude Thomas' October 4 or 5 solicitation of an Employer proposal which would not be subject to Union membership vote tends to support the view that the Employer had been told implicitly that ratification was not a condition precedent to a binding agreement.

1988, and during the 1988 negotiations, is insufficient basis to conclude that the bargaining history shows ratification was a precondition to reaching a binding agreement in the totality of circumstances in this case.

Some of that evidence was presented by Auciello as pure hearsay and in generalized terms. Hence, I find it unpersuasive.

Sauer's testimony that Union representatives said they would submit contract terms to membership ratification in years before 1988 is the strongest evidence supporting the Employer's contention. This is especially true when viewed in the light of the fact (as has been shown) that at least two membership votes were taken in 1988. Nonetheless, I conclude the mere submission to membership votes falls short of making ratification a requirement of the formation of a binding agreement.

The Board has consistently held that where there was no evidence of an explicit agreement between the negotiating parties about union ratification, the formality of such a vote by the union membership is not required as the foundation of a binding collective-bargaining agreement. Newtown Corporation, 280 NLRB 350 (1986); Consumat Systems, Inc., 273 NLRB 410, 413 (1984); Martin J. Barry Company, 241 NLRB 1011, 1013 (1978); C & W Lektra Bat Co., 209 NLRB 1038, 1039 (1974), enfd. 513 F.2d 200 (6th Cir., 1975).

In Childers Products Company, 276 NLRB 709 (1985), more compelling circumstances existed for finding

ratification a requirement of contract formation than in the case before me. The parties, in Childers, signed a memorandum of agreement containing the terms agreed-to by the negotiators. That memorandum ended with the line "THIS AGREEMENT SUBJECT TO RATIFICATION", although no one discussed the meaning of the quoted sentence and there was no discussion of ratification during the negotiations. No ratification vote was taken by the union membership.

The Board left undisturbed Judge Nations' observation that "The condition precedent of 'ratification' means ratification as defined by the Union in its internal procedures. There was no understanding established by the 'parties during negotiations concerning what the Union meant by ratification" (276 NLRB at 711). The Board affirmed the conclusion that those circumstances supported a finding that the method of ratification was within the union's exclusive control and sustained the finding that a vote of the union's executive committee satisfied the ratification issue in Childers.[93]

I find the instant case analogous to Childers. In both cases, the parties had no explicit discussion concerning the

[93] The principle of union self-determination of sufficiency of ratification is well-established. See Zayre Department Stores, 289 NLRB No. 153 (1988); M & M Oldsmobile, Inc., 156 NLRB 903, 905 (1966); North Country Motors, Ltd., 146 NLRB 671 (1964).

ratification process; no ratification procedure was mandated by the union constitution or by-laws;[94] no formal ratification vote was taken by the members on the offer which the union accepted;[95] and the agreement was accepted by a vote of some body of the union (here, the Union's negotiating committee; in Childers, the executive committee). I conclude application of the decisional precedent cited above militates in favor of finding the instant facts show ratification by the Union members was not required to form a binding collective-bargaining agreement in the instant case.

Finally, I conclude the Employer's reliance on the Union's submission of contract terms to membership votes in negotiating years before 1988, and even during the 1988 negotiations, as establishing such ratification votes a precondition to contract formation, is misplaced. Even union negotiator's remarks regarding intention to submit contract terms to a vote by which employer's negotiators "felt" or "understood" ratification was a precondition to a

[94] This observation is unaffected by the fact that the Childers union constitution contained language regarding ratification, while no ratification language whatsoever appears in the instant case. The Childers language clearly is discretionary.

[95] " Arguably, Mortimer's polling of members during the week before acceptance can comprise a ratification vote. If so, the instant Employer is divested of its argument that the membership did not vote to ratify a contract.

binding agreement, were insufficient to make it so (Seneca Environmental Products, 243 NLRB 624, 627 (1979).

Based upon all the above, I find that the evidence in the instant case, when assessed in light of the applicable precedent,[96] does not show that ratification by the Union's membership was a prerequisite to the formation of a collective-bargaining agreement between the Employer and Union. I therefore find, in the circumstances of the instant case, a unanimous vote of the Union's negotiating committee could effectively accept a pending offer for a collective-bargaining agreement.

These findings, however, do not end the inquiry. It is equally important to determine whether or not the Employer's November 17 proposals remained in existence as a contract offer when the Union signified its unanimous "ratification".

(2) Withdrawal of Recognition

There is no dispute that the Employer's extensive oral and written proposals of November 17 effectively comprised a complete contract. However, the Employer,

[96] Apparently believing in the efficacy of its position, the Employer has cited no authority to support its contentions regarding ratification. In addition to studying the cases I have cited above, I have examined cases which eight support the Employer's position contained in an exhaustive analysis of this subject by Board Chairman Stephens" concurring opinion in Sierra Publishing Company d/b/a The Sacramento Union, 296 NLRB No. 65 (1989).

contrary to the General Counsel and Union, argues its proposals were rejected when the Union team "stormed" out from the November 17 negotiations,[97] and there was no offer pending that the Union could have accepted[98] by the Union on November 27.

Under Board law, the formation of collective-bargaining agreements is not necessarily controlled by technical rules of contract law. Ben Franklin National Bank, 278 NLRB 986, fn.2 (1986). The Board's policy regarding offer and acceptance of collective-bargaining agreement terms was summarized by Judge Harmatz in Pepsi Cola Bottling Company of Mason City, Iowa, 251 NLRB 187, 189 (1980), enfd. 659 F.2d 87, 90 (8th Cir. 1981), as follows:

> "...a complete package proposal made on behalf of either party through negotiations remains viable, and upon acceptance in tote must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance, or defeased by an event upon which

---

97 I recognize the Employer seeks to justify its withdrawal of recognition by asserting its good-faith doubt-of-majority argument. For reasons discussed above, I find it unnecessary to deal with this argument in this analysis.

98 That the language of the Union's November 27 telegram constitutes an acceptance is unchallenged.

> the offer was expressly made contingent at a time prior to acceptance."

The Eighth Circuit's enforcement decision approved this policy (see footnote 4, the Court's decision), and restated it this way:

> "Under this policy (of the National Labor Relations Board), an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn" (Footnote omitted).

Clearly, there is neither evidence nor contention that the instant Employer expressly withdrew its November 17 contract proposals any time before the Union's November 27 acceptance telegram. Thus, the focus turns to an examination of whether or not the evidence supports a conclusion that some event occurred which "defeased" the proposals, or from which the parties could "reasonably believe" they had been withdrawn. I conclude the record does not contain sufficient evidence from which it can be found that the November 17 proposals were no longer open for acceptance on November 27.

As noted above, the Employer theorizes there was no offer open for acceptance. The only evidence to support such a theory shows the Union team "stormed" away from

the November 17 bargaining session. However, there is no evidence that any member of the Union team made any contemporaneous remarks, during the team's angry exit from that session, which could be interpreted as a rejection of the Employer's proposals.

Moreover, I find the contents of attorney O'Reilly's conversation with Thomas on or about November 20 illuminating, and contrary to the Employer's position. No evidence was presented to show either that there was an express withdrawal of the November 17 proposals during that phone discussion or that anything was said Which indicates either of the parties believed the Union's November 17 actions constituted circumstances which formed a foundation of a reasonably based conclusion the proposals had been withdrawn. If the Employer believed its proposals had been rejected, I find it reasonable to expect something to that effect would have been said during the Thomas O'Reilly phone conversation.

Viewing the evidence in a light most favorable to the Employer, it is arguable that the Union's November 17 actions reasonably give rise to a conclusion the Employer's proposals had been rejected. Such conclusion, however, would not compel adoption of the Employer's position.

There is nothing in the Board's or Court's Pepsi Cola decision which licenses or contemplates the kind of unilateral judgment the Employer espouses in this case. As I understand the Pepsi Cola language, the special circumstances which might permit a determination that

contract offers have been withdrawn are those from which both parties to negotiations could reasonably draw the same conclusion. No party has cited, nor has my independent research uncovered, any cases which-disengage parties from the statutory collective-bargaining scheme simply upon their separate opinions and surmise of the effects of the other's conduct.

Moreover, even assuming the Employer unilaterally could presume its proposals had been rejected, and that presumption were correct, it is clear that the initial rejection could be revoked at any time before an effective withdrawal. This is so because federal labor policy and principles encourage the formation of collective-bargaining agreements as a stabilizing factor in labor-management relations (Pepsi Cola, supra; Penasquitos Gardens, Inc., 236 NLRB 994, 995 (1978), enfd. 603 F.2d 223 (9th Cir. 1979).

In conclusion, I find the Employer's November 17 proposals were open for acceptance on November 27 and the Union's November 27 telegram constituted their acceptance before withdrawal so as to create a binding collective-bargaining agreement between those parties. Accordingly, I also find the Employer's November 28 withdrawal of recognition untimely, as it occurred during the term of the contract which became effective the previous day (Consumat Systems, Inc., supra, fn.4 and cases cited therein; Belcon, Inc., supra).

Upon the basis of the above factual findings and upon the entire record in the case, I make the following:

IV Conclusions of Law

1. Auciello Iron Works, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Shopmen's Local Union No. 501, a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL-CIO) is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including working foremen, engaged in the fabrication of iron, steel, metal, and other products, or in maintenance work in or about the vicinity of the Employer's Hudson, Massachusetts facility, but excluding all office clerical employees, guards and supervisors as defined in the Act (except working foremen) constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.[99]

4. Ratification, by the Union's general membership, of terms for collective-bargaining agreements between the Employer and Union involved in this case is not required to form a binding collective-bargaining agreement.

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[99] This unit description conforms to the parties' agreement (See footnote 2, above).

5. The Employer's November 17, 1988 proposals for a collective-bargaining agreement remained pending for acceptance on November 27.

6. The Union's November 27, 1988 telegram constituted acceptance of the Employer's November 17 proposals and created a collective-bargaining agreement which the parties are bound to sign.

7. The Employer's November 28, 1988 withdrawal of recognition from the Union was untimely.

8. By failing to sign a collective-bargaining agreement containing the terms of the November 17 proposals, the Employer engaged in, and is engaging in, a refusal to bargain in violation of Sections 8(a)(5) and (1) of the Act.

9. By having withdrawn recognition from the Union on November 27, 1988, the Employer engaged in, and is engaging in, a refusal to bargain in violation of Sections 8(a)(5) and (1) of the Act.

10. The unfair labor practices identified above in Conclusions of Law paragraphs 8 and 9 affect commerce within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy

The unfair labor practices found require that the Employer be ordered to cease and desist from continuing them and to take certain affirmative action designed to effectuate the policies of the Act.

To rectify the Employer's unlawful failure to sign and implement a collective-bargaining agreement, and its untimely withdrawal of recognition, I find it necessary to order the Employer, upon the Union's request, to reduce to writing, sign, and retroactively implement the collective-bargaining agreement which I have found was created on November 27, 1988.

Also, I will order the Employer to make whole all employees to whom the aforesaid collective-bargaining agreement applies for any loss of wages and other benefits suffered as a result of the Employer's failure to sign and give timely effect to that agreement. Those wages and benefits, if any, shall be computed in accordance with the Board's formula in Ogle Protection Service, 183 NLRB 682 (1970), with interest computed under New Horizons for the Retarded, 283 NLRB 1173 (1987).

Further, the order will require the Employer to refrain from, in any like or related manner, interfering with, restraining and coercing employees in the exercise of their rights which the Act guarantees.

Finally, the Employer will be ordered to post an appropriate Notice to Employees.

On the above findings of fact, conclusions of law, and the entire record, I issue the following recommended:

ORDER[100]

Auciello Iron Works, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of employees in the bargaining unit found appropriate, and described in Conclusion of Law paragraph 3, above.

(b) Failing and refusing to sign and implement the collective-bargaining agreement which has been found to have been created on November 27, 1988.

[100] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings and conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On the Union's request, reduce to writing, sign and implement retroactively to November 27, 1988 the collective-bargaining agreement which the Union accepted on that date.

(b) Make whole all employees to whom the November 27, 1988 collective-bargaining agreement applies, including such employees who may have left the payroll since that date, for any loss of wages or other benefits suffered by reason of the Employer's failure to sign that collective-bargaining agreement and its withdrawal of recognition from the Union. Monies due under this make-whole provision are to be computed according to the formulas described in the Remedy section above.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and relevant to determine the amounts owing under the terms of this Order.

(d) Post at its Audson, Massachusetts facility copies of the attached notice marked "Appendix".[101] Copies of said notice, on forms provided by the Regional Director for Region 1 of the Board, after being duly signed by the Employer's authorized representative, shall be posted by the Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1 of the Board, in writing, within 20 days from the date of this Order, what steps the Employer has taken to comply with it.

Dated at Washington, D.C.
November 24, 1989

Norman Zanlkel
Administrative Law Judge

[101] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD".

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board
An Agency of the United States Government

AFTER A HEARING AT WHICH ALL SIDES HAD AN OPPORTUNITY TO PRESENT EVIDENCE AND STATE THEIR POSITIONS, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND HAS ORDERED US TO POST THIS NOTICE AND ABIDE BY ITS TERMS

The Act gives employees the following rights:

To organize;
To form, join, or assist any union;
To bargain collectively through representatives of their own choice;
To act together for other mutual aid or protection;
To choose not to engage in any of these protective activities.

WE WILL NOT unlawfully withdraw recognition from, or refuse to bargain with, SHOPMEN'S LOCAL UNION NO. 501 a/w INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS (AFL-CIO) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All production and maintenance employees, including working foremen, engaged in the fabrication of iron, steel, metal, and other products, or in maintenance work in or about the vicinity of our Hudson, Massachusetts facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act (except working foremen).

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of any of the rights described at the top of this notice.

WE WILL, upon request of the above-named union, put in writing, sign and put into effect, retroactively to November 27, 1988 the collective-bargaining agreement which the union accepted that date.

WE WILL make whole, with interest, all employees to whom the November 27, 1988 collective-bargaining

agreement applies, for all lost wages and other benefits they may have suffered as a result of our failure to sign an agreement containing our November 17, 1988 proposals and from our withdrawal of recognition from the Union on November 28, 1988.

AUCIELLO IRON WORKS, INC.

Dated:_____ By:_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, 6th Floor, Thomas P. O'Neil, Jr. Federal Building, 10 Causeway Street, Boston, Massachusetts 02222-1072, Telephone Number 617-565-6700.

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

(2)

No. 95-668

In the Supreme Court of the United States

OCTOBER TERM, 1995

AUCIELLO IRON WORKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that, after a previously certified union has accepted an employer's offer for a collective bargaining agreement, the employer may not vitiate the agreement by asserting that, based on information known to the employer before the union accepted the offer, the employer had a good-faith doubt that, at the time of acceptance, the union had the support of the majority of the employees whom it was certified to represent.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 1a-8a) is reported at 60 F.3d 24. The supplemental decision and order of the National Labor Relations Board (Board) on remand (Pet. App. 9a-58a) is reported at 317 N.L.R.B. No. 60.

The earlier opinion of the court of appeals remanding the case to the Board (Pet. App. 59a-83a) is reported at 980 F.2d 804. The initial decision and order of the Board (Pet. App. 84a-89a) and the decision of the administrative law judge (Pet. App. 90a-120a) are reported at 303 N.L.R.B. 562.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1995. The petition for a writ of certiorari was filed on October 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner (the Company) operates an iron fabrication shop in Hudson, Massachusetts. At relevant times, the Company had approximately 23 production and maintenance employees. In 1977, the National Labor Relations Board (Board) certified Shopmen's Local No. 501, a/w International Association of Bridge, Structural, and Ornamental Iron Workers (the Union), as the collective bargaining representative of those employees. Since then, the parties have executed successive collective bargaining agreements. Pet. App. 10a-11a, 60a-61a, 95a.

On September 21, 1988, four days before the agreement then in effect was to expire, the Company and the Union began negotiations for a new agreement. The negotiations were unsuccessful. On October 14, 1988, the employees went out on strike. Negotiations continued during the strike. On November 17, 1988, the Company presented a contract proposal to the Union. On that date, the Union neither accepted nor rejected the proposal, and the Company took no action to withdraw its offer. Pet. App. 11a, 61a-62a, 95a-98a.

On November 27, 1988, the Union told the Company that its November 17 contract proposal had been accepted by the Union, that the strike had ended, and that the employees would return to work. Pet. App. 63a. On November 28, 1988, however, the Company sent the Union a telegram stating in pertinent part (*id.* at 64a): "Employer now has reason to believe that

[the Union] no longer represents a majority of the employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations." The Company based its alleged belief that the Union no longer represented a majority of the unit employees on, among other things, assertions that nine of the 23 unit employees crossed the picket line during the strike; that 13 unit employees resigned from the Union; and that 16 unit employees stated to managerial or supervisory personnel that they and their coworkers no longer supported the Union. *Id.* at 72a. Those events allegedly occurred before the Union's November 27 acceptance of the Company's proposal. *Id.* at 12a.

2. In its initial decision, the Board found that the Company had violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (5), by refusing to execute a written contract with the Union and by withdrawing recognition from it. Pet. App. 84a-120a. The Board refused to consider the Company's contention that it had a good-faith doubt that the Union had majority support when it accepted the Company's outstanding contract offer. Relying on *Belcon, Inc.*, 257 N.L.R.B. 1341, 1346 (1981), and *North Bros. Ford, Inc.*, 220 N.L.R.B. 1021, 1022 (1975), the Board explained that, "under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a[n] [employer's] alleged good-faith doubt of the union's majority status." Pet. App. 85a n.2.

On the Board's application for enforcement of its order, the court of appeals upheld the Board's finding that the Company's contract offer remained open at the time the Union accepted it, and that membership

ratification was not required for acceptance. Pet. App. 68a-71a, 83a. The court remanded the case, however, for an explanation of "whether and why the [Company] should not be allowed to try to show that, at the time of the Union's purported acceptance of the Company's outstanding offer, the Union was lacking in majority support and therefore incapable of creating by its acceptance a valid contract." *Id.* at 83a.

3. On remand, the Board reaffirmed its prior rule that, "where objective evidence to support a good-faith doubt of a union's majority status is known to the employer before a union's acceptance of the employer's contract offer but the employer does not act on that evidence prior to acceptance, the union's acceptance creates a valid collective-bargaining agreement." Pet. App. 28a. The Board accordingly concluded that "an employer that disclaims its bargaining obligation in reliance on a good-faith doubt at that point [*i.e.*, after the union's acceptance] violates Section 8(a)(5) of the Act," and that "the employer is precluded during the contract term from withdrawing recognition or otherwise refusing to bargain based on an alleged good-faith doubt that the union lacked majority status at the time of acceptance." *Ibid.*

The Board explained that its conclusion was supported by the case law construing Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), as well as by practical and policy considerations. Pet. App. 28a-37a. The Board determined that it was "inconsistent with the concept of good-faith bargaining" embodied in the case law "to adopt a rule that an employer may continue to bargain—and thus to treat the union as the representative of a majority of its employees—by leaving its contract offer on the table to await the outcome of negotiations before deciding whether to raise a doubt

of the union's majority support based on grounds that it knew existed prior to the formation of the contract." *Id.* at 29a. In rejecting such a rule, the Board observed that "[t]he employer controls whether or when its doubt [as to the majority's continued majority support] will be asserted." *Id.* at 32a. The Board also determined that "a determination of the critical issue of whether an employer had a reasonable doubt, held in good faith but not articulated, at an earlier unspecified time—presumably prior to the union's acceptance of the employer's contract offer—would involve an inquiry into matters too speculative and subjective not only to vitiate that contract but to dissolve the bargaining relationship." *Ibid.* (internal quotation marks omitted).

The Board further explained that its conclusion was not inconsistent with Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), which prohibits an employer from recognizing a minority union even if the employer believed in good faith that the union represented a majority of the employees. See *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961). The Board observed that the Union in this case "was not recognized unlawfully, but was the certified representative of [petitioner's] unit employees"; moreover, it "was operating under a rebuttable presumption of continued majority support" that was unchallenged at the time it accepted petitioner's contract offer. Pet. App. 40a-41a.

Finally, the Board emphasized that it was making a "policy choice" in "establish[ing] a date certain—a union's acceptance of an employer's contract offer—after which an employer cannot challenge the majority status of a certified union based on an alleged good-faith doubt." Pet. App. 53a (emphasis omitted).

The Board determined that "the stability resulting from" its rule "outweighs [the rule's] potential adverse impact on employee freedom of choice." *Ibid.*

4. The court of appeals enforced the Board's order, holding that "the Board's policy choice is reasonable and, as now articulated, quite persuasive." Pet. App. 6a, 8a.

ARGUMENT

1. A union that is certified after winning a Board-conducted election ordinarily enjoys an irrebuttable presumption that it is supported by a majority of employees during the year after its certification and during the term—for up to three years—of any collective bargaining agreement to which it is a party. After the certification year or the collective-bargaining agreement expires, the presumption of majority status continues, but becomes rebuttable. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-38 (1987); *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 343 n.8 (1978) (term of contract); *Brooks* v. *NLRB*, 348 U.S. 96, 101-104 (1954) (certification year).[1] Those "presumptions are based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision." *Fall River*, 482 U.S. at 38. They further the Act's policy of "industrial peace" by "promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees." *Ibid.* (citation omitted). They "also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Ibid.*

This case involves the application of those principles to a narrow set of circumstances: A previously certified union accepted an employer's contract offer; after acceptance, the employer asserted a good-faith doubt that the union had majority status at the time of acceptance; in support of that assertion, the employer relied on evidence known to it prior to acceptance. The question is whether the Board reasonably concluded that, in those circumstances, the employer could not rebut the union's presumptive majority status.[2] The court of appeals correctly held that the

[1] An employer may rebut the presumption of majority status by establishing that, at the time of its refusal to bargain with the union, either a majority of the employees did not in fact support the union or the employer had a good-faith, objectively reasonable doubt about the union's majority status. *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788 n.8 (1990). Here, the Board emphasized that petitioner sought to establish only a good-faith doubt that the Union retained majority support. Pet. App. 17a n.16. In addition, the Board reaffirmed "the principle that a union and an employer are not permitted to continue bargaining if the union actually lost its majority status and the employer and the union are aware of this actual loss." *Id.* at 54a & n.76.

[2] The Board did not decide whether the Company had submitted sufficient evidence to support a reasonable, good-faith doubt about the Union's majority status. Pet. App. 34a. It is well settled, however, that an employee's crossing a union picket line does not necessarily signify a repudiation of the union. *Curtin Matheson*, 494 U.S. at 789. Furthermore, proof that employees desire to withdraw from union membership is not tantamount to proof of a repudiation of the union as a bargaining agent. See, *e.g.*, *Premium Foods, Inc.* v. *NLRB*, 709 F.2d 623, 631 (9th Cir. 1983); *Terrell Machine Co.* v. *NLRB*, 427 F.2d 1088, 1090 (4th Cir.), cert. denied, 398 U.S. 929 (1970); *Bolton-Emerson, Inc.*, 293 N.L.R.B. 1124, 1127 (1989), enforced, 899 F.2d 104 (1st Cir. 1990). Moreover, the evidence upon which the Company relied was hearsay and reflected only

Board's conclusion, which was based in significant part on policy considerations that Congress entrusted the Board to evaluate, was well within its discretion. Pet. App. 6a (citing *Fall River*, 482 U.S. at 42); see also *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450, 453 (1995) ("[T]his Court's decisions recognize that the Board often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application.").

As the Board reasoned, if an employer were permitted to "sit" on its doubt about the union's majority status until after the union had accepted the employer's contract offer, it could "unilaterally" vitiate an agreement not to its liking. Pet. App. 36a. The union would thereby be denied the period of repose afforded by the presumption of majority support during the contract term. See *Fall River*, 482 U.S. at 38 (presumption of majority status during contract term "enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support"). That result is particularly unfair, and at odds with the Act's policy of promoting "industrial peace" (*ibid.*), when, as here, the union may have abandoned an unsuccessful strike in the belief that it could still obtain a contract (albeit on the employer's terms). In

management evaluation of employee sentiment. *Bryan Memorial Hosp.* v. *NLRB*, 814 F.2d 1259, 1262 (8th Cir.), cert. denied, 484 U.S. 849 (1987); *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293, 305-306 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979).

that situation, the union's need for a period of repose may be especially great, since the unsuccessful strike may have weakened its relationship with the employees.

Moreover, as the Board noted (Pet. App. 32a-33a), it is often difficult to evaluate employer assertions of good-faith doubt made after the parties have reached an agreement. In such cases, the employer's objective actions during the bargaining process—including its failure to withdraw the contract offer prior to its acceptance—indicate that the employer accepted the union as a proper bargaining representative. The demonstration of a good-faith doubt after acceptance "becomes amenable to post-hoc reasoning and self-serving interpretations." *Id.* at 36a-37a.

The Board's decision, while protecting the legitimate interests of unions, also recognizes those of employers. The employer has control of "whether or when its doubt will be asserted." Pet. App. 32a. The Board's decision merely requires that, "if an employer is aware of objective evidence to support a good-faith doubt *before* the union accepts its offer, it must, for the defense to be timely raised, act on this doubt before the union accepts its offer." *Id.* at 33a.[3] When the employer does so, its assertion of a lawful good-faith doubt is a "changed circumstance" that vitiates the outstanding offer. *Ibid.* In addition, the employer may withdraw its offer at any time prior to the union's acceptance for any lawful reason, including because of a reasonable, good-faith doubt about the

[3] The Board also left open "the possibility that an employer may be permitted to raise a good-faith doubt that developed contemporaneously with a union's purported acceptance of its offer." Pet. App. 54a.

union's majority support. See *Hickinbotham Bros. Ltd.*, 254 N.L.R.B. 96, 102 (1981) ("It is not illegal for an employer who has weathered a strike to capitalize upon its new found strength to secure contract terms it desires.").

The Board's decision also respects the rights of employees. They remain free to file a decertification petition at any time after the contract has expired and before the union accepts an outstanding offer by the employer for a new contract. See 29 U.S.C. 159(c)(1)(A)(ii).

2. Petitioner's principal contention (Pet. 10) is that the decision below conflicts with the Seventh Circuit's decision in *Chicago Tribune Co.* v. *NLRB*, 965 F.2d 244 (1992). There is no conflict.

In *Chicago Tribune*, the Seventh Circuit held that, after a union had accepted the employer's contract offer, the employer could assert that the union lacked majority support at the time of acceptance. 965 F.2d at 250. In so holding, the Seventh Circuit relied on *Fall River*, 482 U.S. at 51 n.18, and *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961), for the proposition that "the law forbids a company to sign a collective bargaining contract with a union that it knows does not have the support of a majority of the workers in the bargaining unit." *Chicago Tribune*, 965 F.2d at 249-250 (citation omitted).

Neither that proposition nor the holding in *Chicago Tribune* is applicable here. Petitioner did not know that the Union had lost majority support when petitioner refused to acknowledge the Union's acceptance of its offer. Petitioner had, at most, a good-faith doubt about the Union's majority status. See note 2, *supra*. Indeed, petitioner has never asserted—and neither

the Board nor the court of appeals has ever found—that the Union in fact lacked majority support at the time of acceptance. See note 1, *supra*. In contrast, the Seventh Circuit in *Chicago Tribune* understood the employer to have based its refusal to sign an agreement with the union on its knowledge that the union had in fact lost majority support at the time of acceptance. 965 F.2d at 248 ("The company * * * refused to sign the collective bargaining agreement, on the ground that the union no longer represented a majority of the workers.").[4] Furthermore, the Seventh Circuit determined that such a loss of majority support had in fact occurred. *Id.* at 250 ("it became clear that the union had lost the support of the workers"). Thus, the Seventh Circuit held that the Board's rule—"that a union's unconditional acceptance of an offer for a collective bargaining contract is valid and binds the company unless circumstances have changed since the company's offer was made or renewed"—does not "apply to a case such as this where between the original offer and its renewal the

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[4] The Seventh Circuit appears to have misunderstood the basis for the employer's refusal to acknowledge the union's acceptance of the employer's contract offer. The Board found that the employer based its refusal on its "good-faith doubt of the Union's continued majority," not on its knowledge of an actual loss of majority support. 303 N.L.R.B. 682, 686 (1991). The Seventh Circuit's apparent mischaracterization of the basis for the employer's action may well have been influenced by the facts of the case, which, in contrast to those of this case, strongly suggested an actual loss of majority support for the union. At the time the employer refused to acknowledge the union's acceptance, none of the strikers had returned to work, a decertification petition had been filed with the Board, and two-thirds of the replacement workers had signed a petition stating that they did not want union representation. *Ibid.*

union lost the support of the workers." *Ibid.* That holding does not conflict with the decision in this case, in which there was neither an assertion by the employer nor a finding by the Board or the court of appeals that the Union had actually lost the support of the majority of the workers.

Chicago Tribune is also distinguishable because the employees in that case, unlike those involved here, had filed a petition to decertify the union. The Seventh Circuit attached significance to the fact that, pursuant to its "blocking-charge rule," the Board would not rule on the decertification petition pending its resolution of subsequently filed unfair labor practice charges. *Chicago Tribune*, 965 F.2d at 249, 250.[5] The Seventh Circuit observed that the employees were therefore locked into representation "by a union that they emphatically do not want to represent them." *Id.* at 250. The blocking-charge rule did not apply here, because no unfair labor practice charges were filed before the Union accepted petitioner's contract offer and petitioner withdrew recognition from the Union. Thus, the employees were free from the time the contract expired (September 25, 1988) until the Union accepted petitioner's contract offer (November 27, 1988) to file a decertification petition. The employees did not do so, however, and there was no other evidence that they did not want the Union to represent them.

[5] Under its blocking-charge rule, the Board ordinarily will not process a decertification petition when there are unresolved unfair labor practice charges that, if sustained, would preclude a fair election. See *Big Three Industries, Inc.*, 201 N.L.R.B. 197, 197-198 (1973).

The decisions on which *Chicago Tribune* relied are also inapposite here. Neither *Fall River* nor *Garment Workers'* addressed whether a contract with a union that enjoyed the presumption of majority status can be challenged after acceptance based only on the employer's preexisting doubt about the union's majority status at the time of acceptance.

Garment Workers' held that an employer violated Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), by voluntarily recognizing an organizing union that had not gained the support of a majority of the employees. As the Board in this case explained, that holding was based on "Congress' goal in enacting Section 8(a)(2) [of] preserv[ing] for employees the right to choose their bargaining representative free of employer interference or coercion"; "the violation found [in *Garment Workers*'] was the employer's initial grant of exclusive representation status to a union that had not been chosen by a majority of its employees." Pet. App. 40a. Here, by contrast, the Union "was the certified representative of the [Company's] unit employees"; it "was operating under a rebuttable presumption of continued majority support" that "was unchallenged at the time of acceptance" of petitioner's contract offer; and, at that time, "there was no legally cognizable evidence that continued bargaining would involve dealing with a minority union." *Id.* at 40a-41a. The Board reasonably concluded that, under those circumstances, "the aim of Congress in enacting Section 8(a)(2)—to prevent employers from foisting representatives on unwilling employees—is not frustrated by the presumption's protection of the status of [a] certified incumbent union against post-hoc attack." *Id.* at 41a (footnote omitted).

In *Fall River*, this Court suggested that a successor employer might violate Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), if it recognized the incumbent union before a "substantial and representative complement" of employees had been hired. 482 U.S. at 51 n.18. The basic teaching of *Fall River*, however, was that, once the successor has hired a representative complement of employees, and a majority of that complement consists of employees who had worked for the predecessor, the union's rebuttable presumption of majority status continues into the new relationship. *Id.* at 46-52. The present case, of course, does not involve the question whether the presumption of majority status is affected by some event, such as a successorship. Here, there can be no doubt that the Union enjoyed a rebuttable presumption of majority support among a representative complement of petitioner's employees at the time the Union accepted petitioner's contract offer.

Finally, any tension between the decision below and *Chicago Tribune* would not, in any event, warrant this Court's attention at this time. As noted (see note 4, *supra*), the facts in *Chicago Tribune*, which differ significantly from those of this case, appear to have caused the Seventh Circuit in *Chicago Tribune* to misunderstand the relevant legal issue. Furthermore, as the court below noted (Pet. App. 7a), the Seventh Circuit in *Chicago Tribune* was "without the benefit of the Board's present analysis." Accordingly, there is reason to believe that the Seventh Circuit would limit or qualify its holding in *Chicago Tribune* should another case similar to the present one involving the Board's rule arise in that Circuit. Cf. *Rock-Tenn Co.* v. *NLRB*, 69 F.3d 803, 810 (7th Cir. 1995) ("where * * * the company's unfair labor

practices deprived the Union of its certification year protections, it is certainly appropriate to grant the Union an additional six months to resurrect the bargaining process," even though "the extension imposes a potential burden on employee free choice since it reinstates the irrebuttable presumption of majority support for another six months").

3. There is no merit to petitioner's contention (Pet. 10) that the decision of the court below is inconsistent with *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990), and *Bickerstaff Clay Products Co.* v. *NLRB*, 871 F.2d 980 (11th Cir.), cert. denied, 493 U.S. 924 (1989). In those cases, a good-faith doubt about the union's majority status was asserted by the employer after the union's acceptance of the employer's contract offer. In neither case, however, did the parties litigate the timeliness of the employer's assertion of a good-faith doubt. Instead, the parties framed the issue as whether the employer had demonstrated a good-faith doubt, and, in particular, whether the employer could rely on a presumption that striker replacements do not support the union. See Pet. App. 55a-56a.[6] Thus, neither *Curtin Matheson* nor *Bickerstaff* addressed the question presented here.[7]

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[6] In *Curtin Matheson*, this Court held that the Board had reasonably rejected such a presumption. 494 U.S. at 786-796.

[7] Petitioner's reliance (Pet. 20 n.2) on *Viking Lithographers*, 184 N.L.R.B. 139 (1970), is also misplaced. As the Board noted in this case (Pet. App. 26a n.31), the parties in *Viking Lithographers*, unlike those here, had not reached a binding agreement when the employer sought to withdraw recognition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1995

(3)

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No. 95-668

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

AUCIELLO IRON WORKS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCT. 19, 1995
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APPENDIX A

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Board Case No. 1-CA-25969
In the Matter of: Auciello Iron Works, Inc.

Date	Documents
12/1/88	Charge
1/17/89	First Amended Charge
1/20/89	Complaint and Notice of Hearing
2/3/89	Answer to Complaint
6/8/89	Order Rescheduling Hearing
6/21/89	Hearing Opened
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9/5/91	Application for Enforcement
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4/22/93	Letter advising parties of Board's acceptance of Court of Appeals' remand
5/7/93	General Counsel's Statement of Position
5/28/93	Respondent's Supplemental Brief
5/9/95	Board's Supplemental Decision and Order
7/21/95	Decision of the Court of Appeals
7/21/95	Judgment of the Court of Appeals
10/19/95	Petition for writ of certiorari filed
1/19/96	Petition for writ of certiorari granted

APPENDIX B

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF JUNE 21, 1989

ROBERT THOMAS

DIRECT EXAMINATION

[37] Q. Let me show you what's been admitted as General Counsel's No. 5. This is a letter with an attachment. Have you seen this before?

A. Yes, I have.

Q. When did you first see that?

A. When I became aware of it, Mr. Mortimer called me after one of the employees had received it and I probably saw a copy of it sometime during that week. Mr. Mortimer provided me with a copy of it.

Q. Did Mr. Mortimer tell you who got this letter?

A. Yes.

Q. What did he tell you?

MR. O'REILLY: Objection.

[38] JUDGE ZANKEL: Overruled.

Q. What did he tell you?

A. He told me that it had been sent by the company to all employees.

Q. And just so we have on the record the continuity, this letter concerned what?

A. Well, it concerned the company's opinion on where the parties were regarding negotiations and included a form so that the employees could resign and go to work.

* * *

[42] Q. (By Mr. Herbster.) Were there any other bargaining sessions?

A. Yes, there was one on November 17th.

Q. So there were no sessions from the 26th to the 17th?

A. That's correct.

Q. Do you know why there were no sessions between that time period?

A. Well, at the conclusion of the meeting on the 18th, and my understanding it was the same on the 26th when I didn't attend, was that it was left up to the Federal Mediator to attempt to schedule a meeting.

Q. Did you attend the meeting on the 17th?

A. Yes, I did.

* * *

[43] Q. (By Mr. Herbster.) What else was discussed, specifically with regard to bargaining proposals, Mr. Thomas?

A. Well, Mr. O'Reilly indicated that he had a proposal to present on behalf of the company, which he did make the proposal verbally, and then at some point he presented a [44] written proposal.

Q. Let me show you what's been introduced into evidence as General Counsel's No. 6, with a notation of November 17. Do you know who wrote that?

A. Yes. I did.

Q. And is that the proposal you referred to?

A. That is the written proposal, yes.

Q. Now in addition you say there was an oral proposal?

A. Yes.

Q. And what was the oral proposal?

A. Part of his proposal was the IRA contribution, which had been previously agreed to when he resubmitted it.

He submitted a proposal on wages of three percent the first year, four percent the second year and five percent the third year.

His proposal on the cost of welfare coverage was that employers would pay the full cost of all the welfare coverage.

He also stipulated a proposal on an overtime premium pay in which the time and a half provision after eight hours would be increased to time and a half after forty hours.

That was the gist, as I recall, of his economic proposal, other than a written proposal that he submitted.

Q. So is the written proposal in addition to the oral proposal that you've just testified to?

[45] A. Yes.

Q. That was the Employer's proposal entirely?

A. Yes.

Q. You mentioned the wage rates. I believe you testified three percent, four percent and five percent was the Employer's proposal for the three years. Is that your testimony?

A. That's my recollection, yes.

Q. Okay.

Let me show you a one-page document with the notation of November 17th, '88. Is this in your handwriting?

A. Yes, it is.

Q. And are these your bargaining notes?

A. Yes, they are.

Q. In looking at this, I notice it says, "Company Proposal", and there is a notation next to wages.

A. Mm-hmm.

Q. Okay. Take a look at that, and what does that state?

A. That states a four percent increase in the first year,

a four percent in the second and a five percent in the third.

Q. Does that refresh your recollection as to the Company Proposal?

A. Yes, it does.

Q. So that is the correct proposal, four, four and five?

A. Yes.

[46] Q. And it wasn't three percent the third year?

A. No.

Q. For the first year, I'm sorry.

A. No.

Q. When did you write down those bargaining notes?

A. During the meeting.

Q. After you got that entire Company Proposal, the written and the oral proposal that you just testified to, what did you do?

A. We asked for a caucus so that the Union committee could briefly study the proposal.

Q. And what happened?

A. Well, we spent some time reviewing it as best we could because of the extensive written proposal and the areas that it touched on, such as management rights and management prerogatives, grievance and arbitration provisions. We decided if nothing else, we needed some time to study it to find out what the substance was.

Q. Then what happened?

A. We called the Mediator back into the meeting and told him it was our recommendation that we adjourn the meeting and that we were going to review the company's proposal and that we would leave it up to him to schedule further meetings.

Q. Did you ever at that bargaining session tell the Mediator or anyone from the company that you rejected that [47] Company Proposal?

A. I did not.

Q. Did you ever use any word like "reject"?

A. No, I didn't.

Q. What occurred next?

A. Following the adjournment, the Union committee went downstairs in the lobby of the hotel and we spent some time down there discussing the company's proposal.

Q. Was there any result of that conversation after you discussed it with the committee?

A. No, only our concern that the company now was opening up provisions of the contract that we'd had agreement on, and we were kind of concerned about that.

Q. What were those provisions?

A. Well, they were overtime provisions, grievance of arbitration, management prerogatives, employee classifications.

Q. What happened next?

A. We all went our separate way and, as I recall, I had an assignment in another area out of town. I contacted Mr. O'Reilly probably within two or three days of that meeting, in a private telephone conversation, and I talked with him and questioned him on whether there would be any advantage to sitting down and negotiating and trying to come up with a mutually satisfactory package for an agreement.

Q. What did he say?

[48] A. He said to me that that was not impossible, that the company had taken a stand and in his opinion they were not going to change it, and whether he advised them or not, they weren't going to change their position.

Q. Did you say in this conversation that you rejected that last Company Proposal?

A. I did not.

Q. Did Mr. O'Reilly say that the proposal was withdrawn?

A. No, he didn't.

Q. Did he make any indication that would lead you to believe that this was withdrawn?

A. No.

Q. What happened next?

A. I contacted Mr. Mortimer and asked him to contact all of the employees and explain – advise them of the results of the last conference with the company, and recommend to them that we accept the last proposal and end the strike.

Q. What occurred after you told Mr. Mortimer to do that?

A. He contacted me by telephone about five days or so after that.

Q. When would this date be, approximately?

A. Probably around the 26th of November. I recall that because I think it was – I think it was a Saturday. He contacted me from home. He contacted me at my home.

Q. During this week, from the time of the 18th or so until [49] the 26th, where were you. Were you –

A. I was traveling. If I recall, I think I was – had an assignment in Albany, New York. If memory serves me.

Q. So you spoke to Mr. Mortimer on approximately the 26th?

A. We may have had some conversation in the interim with him advising me of what was happening with the contracts, but the final conversation when the contracts had been made was on the 26th, when he called.

Q. And what was your conversation with Mr. Mortimer on the 26th?

A. He advised me that his contacts and those made by Joe Parenti, the steward, clearly indicated that the employees agreed that it was time to accept the proposal and end the strike and go back to work.

MR. O'REILLY: Your Honor, if that is being offered for the truth of the statement, I object to it –

JUDGE ZANKEL: How is it being offered?

MR. HERBSTER: Not necessarily for the truth of it, but for the fact to show what led up basically to the next act. I mean, it didn't come in a vacuum.

JUDGE ZANKEL: Overruled.

Q. (By Mr. Herbster.) There was no ratification meeting at this time, was there?

A. No, there wasn't.

Q. Why not?

[50] A. Well, we felt under the circumstances that time was important and it was time that the strike was concluded.

The employees, economically, were suffering. They had indicated that they had wanted to get back to work if we could get a contract and if we'd have used the procedure that we sometimes use in notifying people and trying to get a hall, it might have taken three or four days. And we felt this way, by phoning people, it would serve the same purpose.

* * *

[51] Q. At anytime during these negotiations, did any employees tell you that they didn't want the Union to represent them?

A. No.

Q. Had you gotten any reports from Mr. Mortimer or from [52] any other Union Representative that the employees had told him or anyone else that they didn't want the Union to represent them?

A. No.

Q. Did you get any reports at anytime during these negotiations in any words to show that the Union had rejected – I'm sorry, that the employees had rejected the Union in any way?

A. No.

* * *

CROSS-EXAMINATION

What did Mr. Mortimer tell you about employees [53] resigning and crossing the picket line – resigning from the Local Union, crossing the picket line and returning to work at Auciello?

A. Well in some cases he told me that the employees that had resigned had in fact contacted him and said that although they had signed a resignation, it was not an indication for lack of support from the Local Union. They needed to go back to work because they needed the money.

Q. And they were saying that they were resigning from the Union because they wanted to go back to work and they needed the money?

A. Yes, that's what he –

Q. What's what Mr. Mortimer quoted them as saying?

A. Mm-hmm.

Q. And who was he quoting, do you recall?

A. I have no idea.

Q. Did you verify the fact at any point that in fact a number of Auciello employees during the course of a strike in fact did resign from the Local Union?

A. I've seen some of the resignations.

Q. I see.

And have you verified with Mr. Mortimer the fact that a number of employees did in fact cross the picket line and come back to work during the strike?

A. Yeah, I think I mentioned that, yes.

* * *

[71] Now, on the last meeting, that was November 17th; [72] am I correct?

A. Yes, I think that's correct.

Q. At the Park West or whatever the hotel was in Marlboro?

A. Yes.

Q. You were given a proposal by the Company in writing and orally, and the written portion of that proposal is General Counsel's No. 6. As an International Representative and General Organizer for, I think you said 25 years, what was in there that you didn't understand and you felt called for an indefinite recess?

A. Well, a change in grievance and arbitration.

Q. You didn't understand that?

A. Not initially, no.

Q. And how long did it take you before you were able to understand that?

A. Well I think I spent some time the following day or the day after reviewing it.

Q. Following – Do you recall what time it was of the day? Was it morning or afternoon that this meeting took place?

A. I recall it was afternoon.

Q. If I suggest to you it was in the morning, would that be of any assistance to you?

A. 9:30 a.m.

Q. Nine-thirty. All right.

And when did you break off the negotiations that [73] day? It was –

A. I don't have the adjournment time, but I would be surprised if we there at the meeting more than an hour.

* * *

[78] Q. (By Mr. O'Reilly.) You had a discussion with me and did I not indicate to you that I didn't envision any foreseeable change in management's then current position?

A. That's correct.

Q. Okay. And did you then – By the way, did you have any questions in that – Did you ask me to explain

any of these written proposals that you indicated you had difficulty in understanding?

A. No.

Q. Okay. And at that point did you ask the conciliator to reconvene the parties?

A. No, because that wasn't the understanding. The understanding was he would reconvene the parties when he thought it was appropriate.

Q. Oh, okay. But you made no requests of him to reconvene the parties; is that correct?

A. Not after the meeting. We told him that we'd be available though.

* * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF AUGUST 8, 1989

CORRECTIONS TO TRANSCRIPT OF 6/21/89

[88] Before we have the hearing in full scale today, I have my own preliminary matter. I have examined the transcript of the proceedings of June 21, and with the counsel's permission, I would like to have the record today reflect three small transcript corrections. I want to discuss it off the record first with counsel so that there won't be any difficulty honoring it. Off the record.

(Off the record.)

JUDGE ZANKEL: Counsel and I have agreed to make [89] the following changes in the transcript. On page 14, line 20, after the words to me, that's t-o, m-e, add the words, the material is remotely relevant, so that the sentence on page 14 that's being in corrected, and

which starts on line 19 will read, quote, I find on the basis of Mr. Herbster's narration to me, the material is remotely relevant and GC #9. Exhibit No. 9, is received. End quote.

The next change in the transcript that we agreed to is on page 28 of the transcript, line 3. To delete the word petition and substitute the word, quote, constitution, end quote.

The next change in the transcript is on page 44, line 3. To delete the word October on line 3 and to substitute the word November.

And the last page to be corrected by agreement of the parties and the Judge is page 82, line 5 and 6. With respect to line 5, the word purposively, p-u-r-p-o-s-i-v-e-l-y, should be deleted. And the word purportedly, p-u-r-p-o-r-t-e-d-l-y, should be substituted. And on page 82, line 6, the word auditing, a-u-d-i-t-i-n-g, should be deleted. And the word, quote, negotiating, end quote, n-e-g-o-t-i-a-t-i-n-g, end quote should be inserted.

Also on page 82, line 22, we have agreed to delete the words, the settlement's. It's s-e-t-t-l-e-m-e-n-t- apostrophe-s, drawn, d-r-a-w-n. And substitute for those [90] words, quote, which are, a-r-e, withdrawn, one word, w-i-t-h-d-r-a-w-n, so that the entire sentence which starts on line 20, page 82 will read, both parties represented will have the opportunity and obligation to do so. And I expect that these documents which are withdrawn will be delivered at the end of that same day's session to the appropriate player.

Have I correctly stated the corrections in the transcript, Mr. Herbster?

MR. HERBSTER: Yes, your Honor.

JUDGE ZANKEL: Mr. O'Reilly?

MR. O'REILLY: Yes, your Honor.

JUDGE ZANKEL: Okay. The transcript is so corrected. Thank you for your cooperation. Okay, Mr. Herbster, you may proceed with your presentation. You can continue with your presentation of your case.

* * *

DAVID MORTIMER

DIRECT EXAMINATION

[107] Q. Now, you said some people had to resign. You mean from the union, correct?

A. Yes.

Q. Okay. Did you have any conversations with anyone about resigning from the union?

A. Not about resigning, no. I talked to other people to see what – nobody said they were going to resign. People I talked with said they had to go to work and they just couldn't stay on strike because of economic problems. But they weren't resigning or quitting their employment. They were just getting part-time work. Even if it was full-time, you know, they still had reasons to go back to work once the strike was settled.

Q. You say that when they got part-time work, some employees got part-time work. Where would that have been?

A. In the area.

Q. At other employers?

A. Yes.

* * *

CROSS EXAMINATION

[110] Q. And in prior negotiations, you would have yourself, a steward, and perhaps an international representative as the negotiating committee. Am I correct?

A. Right.

Q. And have there been any prior problems in your relationship with the company, with negotiations?

A. Not that I recall.

Q. And would I be correct if I characterize the relationship in negotiations as several fairly friendly meetings, shaking hands, and then your committee would bring it back for ratification with a recommendation?

[111] A. Yes.

* * *

[132] Q. And the picketing had stopped on that Friday, is that correct?

A. Yeah.

* * *

REDIRECT EXAMINATION

[138] Q. Did any of those employees ever tell you, or did you hear from any source, that the employees who resigned did not wish the union to represent them?

A. No.

MR. O'REILLY: What was that answer sir? I couldn't hear you.

THE WITNESS: No.

MR. O'REILLY: Thank you.

BY MR. HERBSTER:

Q. Did you hear from those employees or from any source that those employees who resigned had any negative feelings against the union?

A. No.

Q. Did you ever discuss with any employees whether or not they should resign from the union?

A. I think in brief on November 21st, thereabouts, I had talked to a few of them, went back to work.

Q. Do you remember what you said to them?

[139] A. I talked – yes. I told them.

MR. O'REILLY: Would you identify who are the employees you're talking about?

THE WITNESS: I talked to Eddy Windsor. And I talked to Cibelli. Eddy Windsor was concerned, and I think Cibelli was also, about his age. And it would be tough to get reemployed full time elsewhere. And they were getting tight on money, I suppose. Something to that effect. We had little showing on the picket line because of people working. I just said they could go back, there would be no problem.

BY MR. HERBSTER:

Q. They could go back to work –

A. They could go back to work.

* * *

RECROSS EXAMINATION

[152] Q. Did you not do that, sir? Did you not cause charges to be filed against the individuals who resigned from the union and subsequent to the resignation, crossed the picket line?

A. I filed charges against everybody that resigned.

Q. And everybody, including those individuals who resigned on the 13th, the day before the picket line went up?

A. No. I don't believe I did that.

Q. Some people had resigned on the 13th, is the [sic] correct?

A. I don't believe I filed charges on the 13th.

(Pause)

Q. I'm just going to show you Respondent's Exhibits 2A through 2D, the resignations of Stephen Brodeur, Sang [153] Trung, Phuc Van Tan, and Giao Huynh, or something to that effect. Did you not file charges against those individuals?

A. I'd have to check my records. I don't believe I did.

Q. Would you please?

A. I'm not sure – it's been dragging on for so long here.

JUDGE ZANKEL: Off the record.

(Off the record.)

BY MR. O'REILLY:

A. I don't have any copies of charges to these people.

Q. How about the people who resigned on the 14th – the first day of the picket line – did you file charges against them?

A. Yes because the picket line was up.

Q. And they resigned on that day, did they not?

A. They are dated the 14th, yes.

Q. And you filed charges against these men who crossed the picket line the same day they resigned?

A. Right.

Q. Weren't you told by your steward that they physically gave their resignations to the steward before they crossed the picket line?

A. No.

[154] Q. The steward did not tell you that?

A. No, I received them in the mail.

Q. And your steward then told you that he was also given copies of the resignations?

A. I can't recall that.

* * *

FURTHER REDIRECT EXAMINATION

Q. Were the internal union charges completed in some way?

A. They were withdrawn.

[155] Q. By whom?

A. By myself, the local union.

Q. So no employees ever had to face any proceedings against them by the union, is that correct?

A. That's correct.

Q. No employees were even fined?

A. That's correct.

Q. No employees ever had their work relationship in any way restricted?

A. That's correct.

* * *

RALPH AUCIELLO

DIRECT EXAMINATION

[164] Q. Now, there has been placed in evidence a communication from – it's General Counsel's Exhibit 7. A communication, a mailgram to you from David Mortimer. Do you recall receiving that?

A. Yes, I do.

Q. And how did you receive it? Was it physically given to you, or was it called in?

A. It was telephoned to my home on a Sunday.

* * *

[165] Q. Now sir, I'm going to mention some of the names of your employees to you. And when I do, I would ask you to indicate to the Judge what if any grounds you then had for believing that that particular named employee no longer wished to be represented by Ironworkers Local 501.

[166] The first name is Rocco Aliberti.

A. Rocco Aliberti. It was clear to me that he was not a union supporter because on the 18th, which was that Friday that the picketing stopped, he came into the shop. He came over to me and he was picking up his tools. And he told me that he was very sorry the way things worked out. However, if there were, in his mind, going to be a union vote, he would definitely vote against the union.

He told me he felt – and he said this in front of myself and Mike Auciello, my brother – that he felt the men no longer supported the union. He also told me that previous to negotiations, he had been a leader in an effort to remove the union from the shop. And again, he wishes us luck.

He mentioned to us that there were three remaining picketers – this was the morning of the 18th – out there. And he knew that they wanted to come back to work and was going to go out and talk to them and say – and he asked me if I wanted them back. I said, of course I do. And he said he would go out and relay that they would be welcome back at Auciello Iron Works. So that's the way I remember Rocco.

Q. And did he say why [sic] was coming to pick up his tools?

A. He indicated he would be working elsewhere.

Q. All right. Salvatore Morle.

[167] A. Salvatore Morle. After a few days of picketing, he came into the shop. Again, he saw me. He was very upset that he wasn't able to cross the picket line, he said, because he was very concerned about his own personal safety. He mentioned to me that he had no use for the union anymore.

MR. HERBSTER: Your Honor, at this time I'm going to object. I have listened to the evidence on the first one, but I am going to object on the basis of hearsay.

JUDGE ZANKEL: Well –

MR. O'Reilly: It's not hearsay.

JUDGE ZANKEL: Overruled.

BY MR. O'REILLY:

A. He told me this directly that he felt the union did not represent him. He further told me that he did not feel – I'm repeating myself – that the union just plain

didn't represent him. And he stressed the personal safety thing two or three times. I said, Sal, are you sure? What makes you think you won't be safe? He said, just the way the men were talking out there, he had a feeling that he couldn't take a chance on his safety.

Q. And what did he say specifically if anything about his own feelings about supporting or not supporting the union?

A. He said he wouldn't go for the union if he had the opportunity. He would not go for it.

[168] Q. Let's go back a second. Aliberti's duties were what?

A. He was a maintenance foreman.

Q. And Mr. Morle's duties?

A. He was a lay-out man, working foreman and lay-out man.

Q. All right. Richard DeLarda. What were his duties?

A. Richard DeLarda was a welder.

Q. And what information did you have when you got these telegrams about Mr. DeLarda?

JUDGE ZANKEL: Excuse me. Can we be sure the spelling is correct? It's capital D-e, capital L-a-r-d-a?

THE WITNESS: Yes, your Honor.

JUDGE ZANKEL: Thank you.

BY MR. O'REILLY:

A. Richard DeLarda did not speak to me personally. I heard through my secretary, Pat Ferrera, that he had told her that he would not be coming back to work for our company.

MR. HERBSTER: Objection. Motion to strike.

MR. O'REILLY: Your Honor, may I indicate that the secretary that made the comment is in the room and is prepared to testify if that becomes a problem.

JUDGE ZANKEL: And then what you're telling me is [169] that the material is not being offered for its

use of what Mr. DeLarda purportedly said?

MR. O'REILLY: It's only being offered as an indication of the reasonableness of the company's belief that, based on that information, it did not feel that Mr. DeLarda would be considered any longer an employee of the company.

JUDGE ZANKEL: Mr. Herbster, do you want to say anything more about this particular objection?

MR. HERBSTER: I still have a standing objection, your Honor.

JUDGE ZANKEL: Well, the evidence is not being offered for the truth of what this witness or rather apparently said. I'm going to have to receive it. Overruled.

(Pause)

BY. MR. O'REILLY:

Q. And had that information been conveyed to you prior to your meeting on the 28th?

A. Yes.

Q. Of November?

A. Yes.

Q. John Duckworth. What's his position?

A. John Duckworth is the working foreman for the shipping department.

[170] Q. And as working foreman, what are his functions in the shipping department?

A. He would schedule the men for driving. He would recommend disciplines or recommend hiring or disciplinary action. His main function was scheduling the men in the shop.

Q. Who supervises the men in their day-to-day operations?

A. John Duckworth.

Q. And if the men have personal problems at home and want time off, who do they go to see?

A. John Duckworth.

Q. And if the men have vacation problems, who do they go to see?

A. John Duckworth.

JUDGE ZANKEL: Excuse me, Mr. O'Reilly. On General Counsel 10 Duckworth is listed as a unit employee.

MR. O'REILLY: That's correct, your Honor.

JUDGE ZANKEL: And identified as a driver.

MR. O'REILLY: That's correct, your Honor. He's a driver in the shipping –

JUDGE ZANKEL: I'm saying what he's identified as on GC-10.

MR. O'REILLY: That's correct, your Honor.

JUDGE ZANKEL: Is it the Respondent's position he [171] is not a unit employee?

MR. O'REILLY: No, that's not our position.

JUDGE ZANKEL: Then what's the point of this interrogation? It's confusing, in my view.

MR. O'REILLY: He's an employee who wears two hats.

JUDGE ZANKEL: Well, why do we have to know his non-unit hat?

MR. O'REILLY: Because, as I understand, some of the recent board decisions, there would be evidence that Mr. Duckworth passed on to upper management representatives information concerning the sentiments of other unit employees. And the Board decisions seem to say that if that comes from this source of an individual who does wear at least a management hat in addition to his bargaining unit hat, it can be utilized by managmeent as a legitimate, good faith basis for believing that those referenced employees no longer support the union.

JUDGE ZANKEL: Thank you.

MR. O'REILLY: As opposed to information coming from a rank and file bargaining unit employee.

JUDGE ZANKEL: Thank you for the explanation.

BY MR. O'REILLY:

Q. And how long has Mr. Duckworth been a working foreman at the facility?

[172] A. Approximately two to three years.

Q. And does he occasionally attend management meetings on various sales, promotions on manufacturing points?

A. Yes.

Q. And did Mr. Duckworth work during the picketing?

A. Yes, he did.

Q. And what did you ascertain with regard to Mr. Duckworth's support or non-support of the unit?

A. John Duckworth has always been critical of the union. He has oftentimes told me that he really felt the union wasn't representing the men. He didn't want a union. And he told me also that his entire shipping department felt the same way he did on this matter. And John Duckworth resigned, I believe, immediately on the strike and continually crossed the picket line.

Q. And did he advise you that he had resigned immediately?

A. Yes.

Q. Now, when he indicated to you that his entire shipping department did not support the union, how many people – first of all, when was that?

A. Right immediately – well, immediately when the strike started. But previous to the strike, he would often make comments to that effect.

[173] Q. Okay. And how many people were then in the shipping department? And if you could, recall them by name.

A. Well, let's see. Their names were James Chiasson, Stephen Brodeur, Dave Duplisea, Mike Barbour. Let's see. I belive that's it.

Q. So the shipping department –

A. At the beginning of the strike?

Q. Yes.

A. Okay, yes.

JUDGE ZANKEL: Excuse me. Can I have a spelling of those names for the record?

MR. O'REILLY: Chiasson is C-h-i-a-s-s-o-n. Brodeur is B-r-o-d-e-u-r. Duplisea is D--u-p-l-i-s-e-a. And Barbour is B-a-r-b-o-u-r.

JUDGE ZANKEL: Thank you.

BY MR. O'REILLY:

A. I just remembered another gentlemen. It was Richard Boudreau.

Q. And that's B-o-u-d-r-e-a-u?

A. Correct. I believe that's all.

Q. So when your foreman indicated to you the men in the shipping department did not support the union, all of these gentlemen you just listed were in the shipping department?

A. Yes.

[174] Q. Robert Cibelli. What did you ascertain about his feelings?

A. Robert Cibelli was one of the three remaining picketers.

Q. As of when?

A. As of November 18th. So he and the other two picketers came into the office, wanting to speak to Manlio and me.

Q. When did they do that?

A. On the 18th.

Q. This was the last day of picketing?

A. Yes.

Q. All right.

A. This was the day Rocco Aliberti went on his way and talked to them. Anyway, they came back into the shop –

Q. Now, was this after Mr. Aliberti had the discussions you described earlier with you?

A. Yes.

Q. All right.

A. And wanted to come back to work. And he told me that he could not bring himself to cross the picket line because of fear, physical fear. But he wanted to come back to work and wanted to know if he was welcome. I said, of course you're welcome. Come on anytime you want. He said he would come back the following Monday, and he was going to [175] resign from the union.

Q. Did he in fact come back to work the following Monday, which would be the 21st of November?

A. Yes.

Q. And did he indicate to you at that time that he had resigned from the union?

A. I don't recall.

Q. Did he ever indicate to you that he had resigned from the union?

A. Yes, during that week. He made the same statement to my brother Anthony Auciello about being fearful of crossing the picket line.

Q. Was this in your presence?

A. No.

Q. Okay. Now, had he made any comments, other than what you just mentioned with regard to his personal feelings about the union?

A. Yes. When he came in on the 18th he said he had really lost, whatever the word, respect for the union and was no longer a union supporter.

Q. Now, was there anyone else present when this was said?

A. Yes, Manlio DeGrandis, my shop superintendent.

Q. All right.

A. And the other two picketers, Gary Boudreau and Ed [176] Windsor.

Q. The three of them –

A. The three of them came together.

Q. Okay.

A. And talked to me.

Q. On any other occasion, did Mr. Cibelli either state sentiments indicating support or lack of support for the union?

A. Well, after he came back to work, he was just plain happy that there was no union there anymore.

Q. And did he say that to you?

A. He mentioned that – this is a much nicer shop now without a union.

Q. And was this said prior to your telegram being sent to the union?

A. Yes, the week before the telegram. That's why I was so surprised to see the telegram.

Q. Okay. Joseph Parenti. Was he the steward?

A. Yes, he was the steward.

Q. What information as of the 28th of November, when you sent the telegram, what information did you have with regard to the status of Mr. Parenti?

A. I heard, not from himself personally but from my shop superintendent –

Q. That's –

[177] A. Manlio DeGrandis.

Q. Why don't you spell that for the record?

A. That's DeGrandis, capital D-e, capital G-r-a-n-d-i-s.

Q. And his first name?

A. Manlio, M-a-n-l-i-o. He had called Manlio on the telephone and stated that he would not be coming back to work. He had gotten a full-time job at Wyman Gordon and was very happy there. And told him that that was it, basically. And I heard that confirmation of his working

there from another worker, Paul McCarthy, who came in on that same day, the 18th, to tell us he wouldn't be coming back. And he mentioned the fact – when he saw Manlio and me together, that Joe Parenti was working full-time and wouldn't be coming back. And also Kenny Seaver, another fellow who was working full-time, I believe at Antonelli at that time, and wouldn't be coming back.

Q. And just for the record, Wyman Gordon is located where?

A. Grafton or Worcester. I'm not sure.

Q. And that's approximately how far from your plant?

A. Oh, 25 minutes, I guess.

Q. And Antonelli is located where?

A. Antonelli is down in, were [sic] located in Quincy.

Q. What's [sic] about what?

[178] A. An hour.

Q. From your plant?

A. Yes.

Q. Edward Windsor.

A. Ed Windsor was one of those three fellows that came in together. And he essentially stated the same thing that Bob Cibelli said. That he wanted to come back to work and asked if it would be okay if he didn't come back the following Monday, but the next Monday, which would have been the 28th of November, because it was his birthday, and he wouldn't reach a certain age – he didn't want to jeopardize his union pension. So Manlio and I said, sure. And that's when he did in fact come back on the – he had promised us on the 18th that he would be back on the 28th.

Q. And did he come back on the 28th?

A. On the 28th he came back.

Q. And do you know did he ever resign from the union?

A. I don't know.

Q. Did he ever indicate to you that he intended to resign from the union?

A. I don't recall.

Q. James Chiasson.

A. James Chaisson was one of the drivers, and he resigned I believe immediately.

Q. From the union?

[179] A. Yes, immediately when the strike started. And he crossed the picket line and worked throughout the strike. I heard, not from him directly but through his supervisor, John Duckworth, that he no longer wished to have a union in there.

Q. And did you hear that during the course of the strike?

A. From John Duckworth.

Q. Yeah, that's what I meant.

A. Yes.

Q. All right. Stephen Brodeur.

A. Stephen Brodeur, essentially the same thing as James Chiasson. He was a driver. He was even more outspoken. He used to talk about how the union was [sic] joke. This I heard directly from him and John Duckworth. And how he was just so happy that the union wasn't there anymore. He also resigned immediately and crossed the picket line and worked throughout the strike.

Q. And these comments with regards to his feelings concerning the union – were they made during the strike to you?

A. Yes.

Q. Paul McCarthy.

A. Paul McCarthy came in the morning of the 18th –

Q. First, what's his position?

[180] A. He is a welder.

Q. All right.

A. He came in the morning of the 18th and again told Manlio and me together that he would not be coming back, was working in a machine shop and applied for a full-time position as a Postman, I believe.

Q. Did he say what the [sic] machine shop was that –

A. No. He might have, but I forgot.

Q. Okay. All right.

A. There again, he was regretful that things worked out the way they did. He wished us the best of luck, volunteered that information that I said about Kenny Seaver working at Antonelli, Joe Parenti was working at Wyman Gordon. He said he would be happy to work for us part-time if we wanted him to. He indicated and told me that as far as he could tell, most of the men that he talked to had no longer wished to have a union in the company. They were quite upset about the way the union handled it, telling the men was [sic] going on and so forth. And he indicated that if there were an election, he would vote against it and felt that most of the men would also.

I also heard there again, not directly but from my brother Anthony, that he had told Anthony that he was afraid to cross the picket line.

Q. And was this discussion with Paul McCarthy that [181] you had just related – was that prior to your sending the telegram to the union?

A. Yes, I believe it was the morning of the 18th.

Q. The next employee is Giao, G-i-a-o, Huynh, H-u-y-n-h.

A. Giao is a welder in the shop. He resigned immediately.

Q. When you say he resigned –

A. Well, he told my shop superintendent that he resigned. And my shop superintendent told me –

Q. When you say resigned, are you talking about

resigned from the company or from the union?

A. From the union. And he crossed the picket line and worked throughout the strike. He told Manlio, my shop superintendent, that he didn't want a union there. He was happy there was no union there.

Q. And your shop superintendent conveyed this information to you?

A. To me.

Q. And did he convey that information to you prior to your sending the telegram on the 28th?

A. Yes.

Q. Gary Boudreau.

A. Gary Boudreau was one of the three men again who came in the office that day. And he was quite disgusted, [182] very disgusted with the union. The union wasn't talking to him, wasn't telling him anything. He wanted to come back to work. And again, we said fine, come whenever. He came back the following Monday and told me that he was going to resign on Friday and then I believe during that week he said yes, I think I heard from Manlio that he had resigned.

Q. And that's the week of November 21st?

A. He came back on the 21st.

Q. So as of the time you had sent the telegram, he had made these comments to you, had come back to work and had stated to managment that he had resigned from the union?

A. Yes.

Q. Kien Nguyen. And the spelling of that is K-i-e-n, N-g-u-y-e-n.

A. Kien came back on the 28th. But he told us he was coming back on the 28th on [sic] the 18th. Again, he came in on the 18th.

Q. This was the 18th of November?

A. The 18th of November. And said that all along he

had said he would come back to work when Eddy Windsor came back to work. Eddy Windsor was his working foreman. And when he heard that Ed was going to come back on the 28th, he said I'll come back on the 28th also.

(Pause for tape change)

[183] Q. And he said this to you on the 18th?

A. He said this to Mr. Manlio and me, right. He came in the shop. And he told us that he had resigned the same night. He had told us that he had resigned that very same night, the same night of the strike vote.

Q. So that's back to October 13th, correct?

A. Yes, that's what he told us. He said, I already resigned. I just want to come back to work.

Q. Sang Nguyen, S-a-n-g, N-g-u-y-e-n.

A. Again, Sang resigned right away.

Q. Again, please indicate on the record when you say resigned, are you referring to resigning from the company or from the union?

A. From the union. There again, from my shop superintendent I found out he resigned. I know he immediately crossed the picket line and worked throughout the strike. Again, through my shop superintendent I would hear that he was very happy that there was not a union there anymore.

Q. And the shop superintendent is?

A. Manlio DeGrandis.

Q. Okay. Kenneth Seaver. What was his position?

A. He was a layout man. He picketed right up until the last day of picketing, which was the 18th. He came in that morning to pick up his tools. He was one of the few [184] men who had some of his own tools in the shop. He came in to pick up his tools and saw me in the morning. He said he wouldn't be coming back. He was going to Florida.

He came back a little while later in the morning and told my shop superintendent that he had inadvertently left some more tools there and came to pick them up. He told him that he was going to work at Antonelli Iron Works and he would definitely not be back, and he used very strong language.

(Pause)

Q. On Richard Boudreau, what information did you have concerning him when you sent the telegram?

A. Well, I remember about Richard Boudreau that he was another person who was interested in getting rid of the union.

Q. And how did this come to your attention?

A. Through my shipping supervisor, John Duckworth, and also Gerald Sauer, our accountant, had told me that he had come to him to find out how to go about getting rid of the union. And he said, well, he had given him the name of the NLRB.

Q. Who gave –

A. Gerald Sauer.

Q. Gave to Mr. Boudreau the name of the NLRB?

A. Right.

[185] Q. And who indicated that to you?

A. Both John Duckworth and Gerry Sauer.

Q. And did they indicate when all of this happenes [sic]?

A. Well, this was around the month of September, before the negotiations took place.

Q. Now, Mr. Boudreau – did he work at all during the strike?

A. No.

Q. David Duplisea.

A. David Duplisea came back to work after the picket line was through. He was afarid to cross the picket line, according to what he told Scott Duplisea, his brother who is a management person in our company. That he

was afraid to cross the picket line because he worked as a – his main job wa [sic] a fireman. He belonged to the fireman's union. He was a part-time truckdriver for us. And then he was a PFO, or whatever the union measures are from one union to another. He indicated also through Scott, his brother, that he was against the union in this company of ours – that we didn't need one. And he would have voted against it if he had the opportunity.

Q. And Mr. Duplisea, is it your understanding he resigned from the union?

A. Yes.

Q. And this was after the picketing was over, is that [186] correct?

A. Yes.

Q. But prior to your telegram of the 28th of November?

A. Correct.

Q. And were you aware of that fact when you sent the telegram on the 28th?

A. Yes.

Q. Michael Coyne, C-o-y-n-e.

A. Michael Coyne. Um, he came into the shop, again around – I'm going to guess the middle of November or before the 28th. And he just wished me luck. He said he's sorry the way things worked out, but he had found another job elsewhere and would not be coming back.

Q. And did they have personal lockers there for tools and –

A. Well, he was picking up some – he was one of the fellows that had some tools, and he was picking up his tools at the same time.

Q. Did he indicate where this other position was that he had?

A. It was a shop in Worcester. And no, he did not. It was just a small shop. That's all he said.

Q. Paul Greenglass.

A. Paul is very, very outspoken.

[187] Q. Well first, what was his position?

A. Paul, which?

Q. Greenglass.

A. Greenglass was a welder. He was very, very outspoken against the union. The night the strike vote was taken, he came back talking about how crazy those guys are that support the union. The company would be better off without a union. He continuously – he crossed the picket line and worked throughout the strike. He made these remarks not only to me, but to other people in the company – Manlio, Scott Duplisea, Michael J. Auciello. He was very, very outspoken.

Q. And –

A. It was clear in my mind he was not a union supporter.

Q. And did he continue to work during the picketing?

A. Yes.

Q. And did you have information concerning whether he had resigned from the union?

A. He reportedly told my supervisor, the superintendent, that he had resigned. So I had reason to believe he had.

Q. And were you aware of this prior to sending the telegram?

A. Yes.

[188] Q. Quang Nguyen, Q-u-a-n-g, N-g-u-y-e-n.

A. Quang came in on the 18th.

Q. November 18th?

A. November 18th. He indicated that he had been afraid to cross that line again for personal safety reasons.

Q. Who did he say this to?

A. To me and Manlio together.

Q. All right.

A. And that he would be back to work for us on the 28th of November, the week after – a week from the following Monday. And he also indicated that he was going to resign from the union.

Q. Now, does he have contact with John Duckworth at all?

A. Not really. He's not in his department. However, all the men talk to each other up there in the shop.

Q. Had Mr. Duckworth passed any information on to you concerning Quang Nguyen?

A. There was a time when, yes. Out at the coffee truck Quang made some remarks about how he really thought the union was a mistake and a joke, we didn't need one – that type of thing.

Q. And was this information passed on to you by Mr. Duckworth?

A. Yes.

[189] Q. And were you aware of that information when you sent the telegram of November 28th?

A. Yes.

Q. Michael Barbour.

A. Michael Barbour worked in John Duckworth's department. He was on vacation on the day of the strike. And John Duckworth told me that he had called him, told him what had happened and told him about the strike. And Mike indicated he would be back to work on the Monday following. And in fact he did. He crossed the picket line, came to work. And John told me he had resigned I believe on that Monday from the union.

Q. Just on your last sentence. Do I understand that John Duckworth told you that Michael Barbour had stated he had resigned from the union?

A. Yes.

Q. And you were aware of that information when you sent your telegram?

A. Yes.

Q. Phuc Tran, P-h-u-c, T-r-a-n. What information do you have with regard to him, or what information did you have as of the 28th of November?

A. Well, I know that he had crossed the picket line and worked throughout the duration of the strike. I knew from Manlio, he had told Manlio that he had resigned I think [190] right away from the union. He was another fellow that used to make comments to Manlio, Manlio told me, about how this place was a much happier shop without the union.

Q. And were you aware of that prior to sending the telegram on the 28th?

A. Yes.

Q. Frank Tomolillo.

A. Frank Tomolillo picketed the first half day on the Friday when the strike started. He came in at noontime. He said, I've had it with this union. I'm going to resign right away.

Q. Who did he say this to?

A. Me. He said it to me. And that was it. He didn't picket anymore, and he worked throughout the strike.

Q. He crossed the picket line every day?

A. Yes.

Q. Did he ever make any comments with regard to his feelings concerning the union?

A. He was not – general comments about, this union is for the birds. What do we have this union for? He would say things like that to me often. He'd say things like that to my brother Mike quite a bit.

Q. Now. Mr. Tomolillo – would you describe his duties? Was he a member of the union, to your knowledge?

A. Well, originally he was a layout man throughout [191] the shop.

Q. Why don't you just describe to the Judge what a layout man does?

A. A layout man is a man who reads a blueprint and assembles things and gets them ready for the welder. He's kind of like a very crucial experienced type of person.

Q. He doesn't do any actual welding –

A. No, no. He would do tack welding, assembly type welding. And the welder would do the finished bulk of the welding.

Q. Okay.

A. He was a layout man for many years, then he became a working foreman. He has been with the company for many, many years. And more recently, in the last ten years or so, he has been in the estimating department. But he retained his union membership so that he on occasion could go out and work in the shop as a layout man.

Q. Have there been occasions in the last ten years where he does go out and do work in the shop?

A. Yes.

Q. And can you give us some examples of those?

A. Well, I can't remember the jobs specifically. But when his experience was needed, when we were short handed or whatever, we would ask him to go out in the shop and do some layout work.

[192] Q. And would he work with the layout men as far as preparing their jobs for the layout men?

A. He would probably work with a mechanic when he was doing this.

Q. I see. And has he been – all the benefits that are set forth in the collective bargaining agreement, vacations, holidays – does he receive those benefits?

A. Yes.

Q. And does he have his dues paid under the contract with the union?

A. Yes. He's paying dues forever. He's always been part of the welding team there.

Q. Now, after the commencement of the picketing activity, did you engage supplementary employees?

A. Yes.

Q. And was one of those employees Gerardo Mazzola?

A. Right, correct. Gerardo Mazzola.

Q. When was he employed?

A. He was retired from our company.

Q. He had worked for you in the past –

A. Yes.

Q. He had retired?

A. He had worked – we asked him to come back and work part-time after the strike started to help get the work out the door.

[193] Q. And did he have peculiar restrictions as to the amount of hours that he could work for you?

A. Yes.

Q. What were those?

A. He could only work, I believe, less than 40 hours in any one month.

Q. And was that related to his pension eligibility?

A. That, I believe, was the reason.

Q. That if he worked more than 40 hours a month in the trade, he would be jeopardizing his pension. Is that correct?

A. That's as I understand it.

Q. All right. So did he work the 39 hours or so on a monthly basis –

A. Right.

Q. Durin [sic] the course of the picketing?

A. Yes.

JUDGE ZANKEL: Can you spell his name please?

THE WITNESS: T-o-m-o-l-i-l-l-o.

JUDGE ZANKEL: No, Mazzola.

THE WITNESS: Oh, I'm sorry. M-a-z-z-o-l – one l?

MR. O'REILLY: Two L's.

THE WITNESS: It's supposed to be one L.

JUDGE ZANKEL: Two Z's, one L.

MR. O'REILLY: Right. That seems to be the [194] consensus, your Honor. Two Z's and one L.

JUDGE ZANKEL: Isn't that like the margerine [sic]? Same spelling? Okay.

BY MR. O'REILLY:

Q. And did he continue working – was he employed during the first week of the picketing?

A. I believe he was.

Q. And did he continue on this 39-hour basis? At least was he still employed at the end of the picketing?

A. Yes.

Q. And was he still employed at the time of your telegram?

A. Yes.

Q. Now, during the course of the time that he was working for you on the basis you have just described, did he make any comments with regard to his feelings concerning the union?

A. Gerry Mazzola was very outspoken throughout his career at Auciello Iron Works about anti-union feelings.

Q. And what type of work was he doing?

A. He was a layout man.

JUDGE ZANKEL: The question was, during the period of the strike. Was he saying something something about the union?

THE WITNESS: Yes, your Honor. He made frequent [195] remarks of what's going on with those guys? Why do they need a union here? He was just very clearly anti-union.

BY. MR. O'REILLY:

Q. Did he make any comments about his own personal feelings concerning the support or lack of support for a union?

A. Yes, he did.

Q. What were those?

A. He said if he had the occasion, he would vote against the union. And he did not feel –

Q. Did he say this to you?

A. He did not feel that – he did not want a union himself and that a lot of the men felt the same way.

Q. Now, did he say this to you?

A. Yes. He told me that many a time. And he told Manlio that. He told Mike Auciello that. They told me he told them that.

Q. ANd [sic] he crossed the picket line each day that he worked, is that correct?

A. He crossed the picket line to work. I believe it was starting the first week of the strike.

Q. Van Lee, V-a-n, L-e-e.

A. Van Lee was a welder. He did not – he had applied to work at Auciello Iron Works before the strike, I believe a week before the strike started. And he came to work, [196] started working for us I believe the first week of the strike. He crossed the picket line and worked throughout the strike.

Q. And did he ever join the union, to your knowledge?

A. No, he never joined. Again, through Manlio, he would make remarks that he was not a union supporter.

Q. And did Manlio pass this on to you?

A. Yes.

Q. And you were aware of those remarks when you sent the telegram on the 28th?

A. Yes.

Q. Michael Connolly.

A. Michael Connolly was hired I believe in the first week or two following the strike. He was hired to replace one of the men in the receiving department. John Duckworth –

Q. And the receiving department is part of the original bargaining unit?

A. Yes, the shipping/receiving department. There again, John Duckworth made remarks to me that Connolly wasn't a union brother.

Q. And he crossed the picket line each day?

A. Yes.

Q. Did he ever join the union?

A. No.

[197] Q. And was he employed as of the 28th of November?

A. Yes.

Q. And by the way, Van Lee, was he also employed on that same 28th?

A. Yes, he was.

Q. Clayton White.

A. Clayton White. He answered an ad that we had placed in the newspaper during the strike. He worked in the yard, a yard man under Manlio DeGrandis.

Q. And under Massachusetts law, did you take steps to place any notation on the newspaper ad concerning the existence of a labor dispute?

A. Yes. On the bottom of our ad we had labor dispute.

Q. And Clayton White responded to that ad?

A. He responded to the ad, crossed the picket line, worked throughout the strike. And again, I heard through Manlio that Clayton White was a gentleman who did not wish to have a union represent him.

Q. And is that the – and Clayton White, was he still employed by your company as of the 28th of November,

when you sent a telegram that is marked as General Counsel's Exhibit 8, was sent to Local 501?

A. Yes, the telegram you showed me?

Q. Yes.

[198] A. Yes. The telegram that we sent that following Monday?

Q. That's correct.

A. Yes.

Q. Okay. And is the information concerning what you have just testified, was that the basis for your belief as of the 28th that a union did not represent a majority of the Auciello employees?

A. Yes, it was clear in my mind.

* * *

CROSS EXAMINATION

Q. Mr. Auciello, it seems like you heard some reports and had some employees speak to you about their union sentiments. You just testified to that. That's correct, right?

A. Correct.

[199] Q. And this had been an ongoing thing, this speaking to you about the union, isn't that correct?

A. No.

Q. When did it occur? I thought it was ongoing.

A. No, this all started with the strike.

Q. Can you recall the first date that you found out that people didn't support the union?

A. The night of the strike, when men crossed the picket line.

Q. When was the last conversation that you had with someone that they didn't support the union?

A. I can't recall the last one.

(Pause)

Q. Do you know whether it was November 1st or December 1st or any time frame at all?

A. The discussions about remarks made to me were ongoing during the strike. And I don't really recall the last time someone gave me an anti-type of remark.

* * *

Q. Did you have any conversations with anyone or learn about their sentiments after the 17th?

A. Yes. As I indicated the next day, the 18th, quite a few discussions took place.

[200] Q. Did you have any conversations that you can recall now after the 18th?

A. During that week of the 21st there were discussions, comments that I have indicated.

Q. When did it come to your attention that the union didn't represent in your mind the majority of the employees?

A. It became a serious discussion the morning after we received the telegram indicating that the union had accepted our latest proposal. And we sat down and had a conference, as I indicated, to discuss the telegram that was sent to us. And since in that telegram it had stated – through all our experience of negotiating, we were always told that the men had the last say and the men are the deciding factor. And we went down the list of them and in our minds, what we knew then who had crossed the picket line, who had come back to work, who had told us they worked elsewhere and so forth, and it was just a logical way to respond to that telegram. In our minds, the union no longer represented by a large majority the wishes of the men. So in order to be able to say that in our telegram, we wanted to logically – we logically discussed it, in other words, at that time.

* * *

[203] Q. You wanted employees to resign from the union, didn't you?

A. I wanted employees to work for Auciello Iron Works.

Q. Didn't you want them to resign from the union before they came back to work?

A. I wanted the men to work Auciello Iron Works.

Q. Would you answer the question, Mr. Auciello?

A. No. Resigning was not a condition of working.

Q. Didn't you suggest to them to them [sic] through a letter in October that they should resign and come back to work?

A. No. I gave them the option of resigning to prevent possible union claims.

Q. Do you recall that you wrote under your signature on October 14th about resigning from the union?

A. I recall a letter which mentions in it the option of resigning. I wish you'd stop putting words in my mouth.

Q. I'm just trying to get the facts from you, sir. And let me show you this. There is a typewritten addendum with a resignation.

[204] A. Yes.

Q. Did you prepare that?

A. Yes, I did.

Q. Why did you prepare that, Mr. Auciello.

MR. O'REILLY: Your Honor, I think at this point I'm going to object to discussing this particular document. I think the court, your Honor ruled that it was remotely – might be remotely material. But apparently, it's going to be the subject matter of lengthy cross examination. And I'm going to again raise the objection as to its materiality.

JUDGE ZANKEL: Overruled. Please answer the question.

BY MR. HERBSTER:

A. Yes, I prepared the statement.

Q. Why did you prepare that, Mr. Auciello?

A. So that if an individual wished to resign from the union, they could use that format.

Q. Did any employee ask you to prepare such a resignation form?

A. What the employees did do was indicate a willingness to cross the picket line and work. And upon hearing that, I called up my attorney and stated that to him. And he told me some of the possible repercussions of my men doing that could be that they could be fined. And if those men wished to avoid the possibility of a fine, they [205] may resign from the union. And we discussed how could they resign. And he said, they may make this type of a statement. I said, would it be okay if I drafted that for their resignation if they wish to resign? And he said, that's perfectly fine.

Q. So then your answer would be, if I am correct, that no employee asked you to draft that particular typewritten note?

A. They asked me how could they come back to work without suffering repercussions.

Q. I take it your answer is no, that no one asked you to draft it.

A. They did not say in those words, draft me a letter. I don't see how they could say that.

Q. Let me show you what's been marked as Respondent's Exhibit 2B. Have you seen that before? That's a handwritten resignatiion [sic].

A. Yes, that's correct.

Q. Do you know who prepared that handwritten form without the name or signature filled in?

A. I did, after the conversation I just explained.

Q. And that's your handwriting?

A. Yes, it is.

Q. Had anyone on October 13th or before that time asked you – any employee asked you how to resign from the [206] union?

A. No.

* * *

[228] Q. You had some conversations with Stephen Brodeur about the union?

A. Stephen Brodeur? Um, more so through his supervisor, John Duckworth.

Q. So you didn't have any direct conversations with Stephen Brodeur about the union?

[229] A. I did recall one time, once or twice where Stephen would tell me that he thought the union was a joke. But this was volunteered to me. We didn't explore the comment.

Q. Is that all he said, that he thought the union was a joke?

A. He thought it was unnecessary – it was a joke.

Q. And that was it?

A. Yeah, something like that, yeah.

Q. Did he ever tell you, or Duckworth ever tell you that he was happy the union wasn't there anymore?

A. John Duckworth told me that Stephen Brodeur did not like the union – words to that effect that he thought the union was a joke. That's the way he would say it.

Q. But the specific question was, did he ever say that – did either Duckworth or Brodeur say to you that Brodeur was happy the union wasn't there anymore?

A. No, I don't recall those exact words.

Q. Did you testify on direct examination that Mr. Brodeur told you or Mr. Duckworth told you that Mr. Brodeur said that he was happy that the union wasn't there anymore?

A. If I did, I don't recall saying those exact words.

Q. When would it have been, Mr. Auciello, that Mr. Brodeur told you that the union was a joke or that Mr. Duckworth told you that Mr. Brodeur said the union was a joke?

[230] MR. O'REILLY: Well, which is it?

MR. HERBSTER: I don't know. I'm asking –

JUDGE ZANKEL: Try each statement separately, if you don't mind.

MR. HERBSTER: Okay. Maybe I should clarify.

BY MR. HERBSTER:

Q. Did Mr. Brodeur tell you directly that the union was a joke, or was it otherwise?

A. It was through John Duckworth.

Q. Just for clarification – I don't want to beat a dead horse – but Mr. Duckworth then told you that Mr. Brodeur thought the union was a joke. Is that correct?

A. Um-hum. Yes.

Q. When did Mr. Duckworth tell you this?

A. This would have been immediately following the first few days after the strike started.

Q. Did Mr. Duckworth tell you when Mr. Brodeur said that?

A. Um, not specifically. I can't recall that he said – no, I can't recall that he had told me when he had told him that.

Q. So you don't know whether Mr. Brodeur told Mr. Duckworth that that day or six months before, correct?

A. Correct.

* * *

PATRICIA FERRERA

DIRECT EXAMINATION

[238] Q. And directing your attention to he week of November 18th, 1988, did you have occasion to see Mr. DeLarda?

A. Yes, I did.

Q. And what was the occasion, and if you had a discussion with Mr. DeLarda, would you relate what that discussion was?

A. Yes, sir. He was in the office at the time. And I ran into him in the hall. And we just had a few words. I asked him if he was going to be coming back to work for us. He said no, that he had another job somewhere else and that he would not be back to work for Auciello.

Q. And was that the same day that the picket line finally went down?

* * *

CROSS EXAMINATION

[240] JUDGE ZANKEL: Ms. Ferrera, can you tell us with greater certainty what day you spoke with Mr. DeLarda?

THE WITNESS: I want to say it was around the 18th of November.

* * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF AUGUST 9, 1989

RALPH AUCIELLO (RECALLED)

CROSS EXAMINATION

[253] Q. Now, Mr. Auciello, you say that with regard to General Counsel 14 – the one with Auciello Iron Works on the top – you saw that on November 28th, 1988. Correct?

A. I believe I did.

Q. Do you know if you saw it before that day?

A. I don't believe I did.

Q. Who made those check marks, if you know?

A. I believe it was Attorney O'Reilly.

Q. And how did he come to make those check marks?

A. We were having – discussing the telegram. We were having a meeting, and we were discussing the names of the employees, and how we felt they felt about [254] the union, and he was making these check marks.

Q. After those check marks were made, did that document come back to your possession?

A. Well, I had this in my files. So I must have retained a copy of it.

Q. And you had it in your files with the check marks?

A. Yes, just as – like this.

Q. After the check marks were made, you looked at the check marks and the document. Didn't you?

A. I be – I must have.

Q. The check marks on the left – to the left of the names –

A. Yes.

Q. – what do they mean?

A. I believe they would indicate our opinion as to an individual, who if there were an election, would vote against the union.

Q. The check marks on the right – to the right of the name, what do they mean?

A. In our opinion, the individuals who would vote for the union.

* * *

[256] Q. Directing your attention to General Counsel's Exhibit No. 15, which is the shop employees with the yes, no, will notes – those words on the top, have you seen that before?

A. Yes.

Q. When did you see that?

A. Well, this – this – I made – these were my own check marks, and I don't remember the date that I – that I made these marks.

Q. Well, was it before the document we referred to, General Counsel's 14?

A. Yes. Must have been before.

Q. Why do you say it must have been?

A. Because there are some individuals on this list who we felt less sure of, as to their decision, than there were on this document.

* * *

[257] MR. HERBSTER: Let's just see if we understand that document 15, Mr. Auciello.

There are four columns, and there is a – a column headed Yes, with some words crossed out, and check marks.

BY MR. HERBSTER:

Q. What does that column mean?

A. Those were the individuals – at the time of this meeting, whenever this was held, that we felt very sure would vote against the union, were there an election to be held.

Q. When you say "we", whom do you mean by we?

A. We, the members of that meeting.

Q. Who was at that meeting, if you can recall?

A. Most probably myself, Attorney O'Reilly, and members of management.

Q. Those check marks are your check marks, [258] though. Correct?

A. Yes.

Q. And the column No, what does that mean?

A. That's the column – at that time, that if we had any doubt at all, in your minds, no matter how slight. If any of the individuals in that meeting had doubt in their mind, we would – I – I put a check on that column.

Q. Doubt as to what?

A. How they would – if there were to be an election held, how they would vote.

JUDGE ZANKEL: You inserted the check marks on GC-15?

THE WITNESS: Yes, sir. Yes, Your Honor.

* * *

[259] Q. Now, you based your decision as to where to put the check marks on this document, General Counsel 15 – you based on [sic] that on a number of factors. Didn't you?

A. Yes.

Q. Did you base where to put the check marks [260] on your conversations with employees about their union sentiments?

A. I based it upon the opinion of the people in the room at that time.

Q. And the opinion of the people in the room, that was based on conversations that they had with employees? Is that one thing it was –

A. That was –

Q. – based on?

A. – one of the – that was one of the reasons.

Q. And was it, also, based on resignations from the union?

A. That would have been another indication.

Q. Was it based on people who didn't strike? Was that what it was based on, also?

A. That –

Q. Whether they did or didn't strike, was that one of the factors?

A. That – well, the fact that – yes, that would have been another factor.

Q. And reports that you got from other employees – that supervisors may have gotten from other employees, as to a person's union sentiments, not their own? Was that one of the factors used to –

[261] THE WITNESS: That was the first – the first question, right, was how the people in the room rendered their opinions?

MR. HERBSTER: The first question was – well, let me rephrase it just to make it clear.

BY MR. HERBSTER:

Q. Some people spoke directly to you. Correct? Some employees?

A. Yes.

Q. And whatever they said to you, that was one of the factors that you –

A. Yes.

* * *

[291] Q. Now, let me turn to Mr. Richard Boudreau. Do you remember him?

A. Yes.

Q. I believe you testified that he had tried to get rid of the union, prior to the strike?

A. I testified that that was reported to me. Yes.

Q. And he did strike? He was a picket. Correct?

A. Yes.

Q. You saw him on the picket line?

A. Yes.

Q. In fact, there was a newspaper article published in the local paper sometime in October about the strike. Did you see that at the time that came out?

A. Yes, I did.

Q. You read that, and did you see Mr. Boudreau quoted in there?

[292] A. Yes, I did.

Q. And his comments were in favor of the union in that article. Weren't they?

A. I don't recall his comments.

* * *

[294] JUDGE ZANKEL: Okay. Do you remember the question?

THE WITNESS: Was this comment in favor of the union? Is that your question?

MR. HERBSTER: Yes.

A. I guess so.

Q. And when you read that, you knew that – at that time, that you had heard that Mr. Boudreau had tried to get rid of the union?

MR. O'REILLY: Well, there is no evidence that he read this back in November.

[295] MR. HERBSTER: I asked him that.

JUDGE ZANKEL: He asked him.

THE WITNESS: No, I – I had read this.

MR. O'REILLY: Oh, okay.

BY MR. HERBSTER:

Q. In October?

MR. O'REILLY: I'm sorry.

BY MR. HERBSTER:

Q. Correct?

A. Yes, I was aware of this article.

JUDGE ZANKEL: Right. Right. That's exactly what he said before –

MR. O'REILLY: Okay.

JUDGE ZANKEL: – Mr. O'Reilly.

MR. O'REILLY: I withdraw that.

JUDGE ZANKEL: Okay.

A. And I guess that it appears that he was in favor. He was out there picketing.

Q. And that was at a time after you had heard that he was trying to get rid of the union? Correct?

A. That's correct.

* * *

RECROSS EXAMINATION

[321] JUDGE ZANKEL: Okay. You have General Counsel's 14 and 15 in front of you?

THE WITNESS: Yes.

JUDGE ZANKEL: All right. Now, I recognize you indicated earlier when I questioned you that you are not sure of the precise date General Counsel's 15 [322] was worked on, that is when – the date you put the check marks on. Right?

THE WITNESS: Yes.

JUDGE ZANKEL: But it was at a meeting among the managerial personnel of the respondent?

THE WITNESS: Yes, Your Honor.

JUDGE ZANKEL: And that was a separate meeting from the meeting that you had with those same managers on the 28th of November?

THE WITNESS: To the best of my recollection, it is, Your Honor.

JUDGE ZANKEL: But Mr. O'Reilly was not at that first meeting –

THE WITNESS: No.

JUDGE ZANKEL: – is that correct?

THE WITNESS: Yes, he was.

JUDGE ZANKEL: He was?

THE WITNESS: Yes.

JUDGE ZANKEL: He was at both?

THE WITNESS: Yes.

JUDGE ZANKEL: Can you give us approximately – are you talking in terms of a week, two weeks, or what, something like that? Approximately how long before the 28th did you work on GC-15, at that other meeting?

[323] (Pause.)

THE WITNESS: One to two weeks it the best I can, honestly, remember. I know it had to be toward the end.

* * *

[325] JUDGE ZANKEL: All right. At the time of [sic] just after General Counsel's 15 was prepared, was – was there, at that meeting, a discussion of whether or not the respondent should advise the union that it doubted its majority?

THE WITNESS: No, I don't recall that being a discussion.

JUDGE ZANKEL: Was there a discussion, at that particular meeting, among the managers, that the results of tallying General Counsel's 15 reflected that the union lost its majority?

THE WITNESS: I recall it being in the context of a would there be – if we could have an election today type of scenario, how would the election [326] turn out, and then we said, well, let's find out how we think it would turn out, and that's when I recall the check mark score card thing here.

* * *

[328] JUDGE ZANKEL: Was there any decision made, as to what the next move of the employer would be at that point?

THE WITNESS: No.

* * *

REDIRECT EXAMINATION

[344] Q. Of the employees, that had – in the Labor Board Certification for Local 501, of the employees that had, in 19 – in September and October of 1988, how many of those employees were involved and worked for your company at the time of the election?

THE WITNESS: In the bargaining unit?

MR. O'REILLY: Yes.

A. In the bargaining unit, none.

Q. None. All right. Now, the Judge asked you several questions concerning General Counsel's 14 and 15. General Counsel 14, which is on the Auciello Iron Works letterhead, do I understand that that was put together sometime prior or the day that you sent the telegram for the purposes of your own in-house [345] determination as to whether or not employees supported or did not support the union?

A. Yes.

Q. And do I gather that you met with three or four management people, plus your attorney, and – is that correct?

A. Yes.

Q. And was it the consensus of this group reflected in this General Counsel's 14?

A. Yes.

Q. Now, the earlier document, General Counsel's 15, which is not on your letterhead and has the names plus four columns, for what purpose was that put together? Was that put together for assessing their overall feeling

of management as to the union sentiment among the employees or was that done with regard to a worst case scenario for an election?

A. Yes. As I indicated, we were – the worst case scenario.

Q. And if you felt that the – in any one of the names reflected in General Counsel's 15, if you felt that there was even the slightest possibility of that union – that employee voting for the union, where did you put the check next to his name?

A. In the second column.

[346] Q. Okay. So do I gather from that that there might be employees that you've checked off in the second column that you felt actually did not support the union but that weren't 100% sure of?

A. That's exactly correct.

* * *

MANLIO DEGRANDIS

DIRECT EXAMINATION

[353] Q. All right. On Stephen Brodeur, during the [354] period of the negotiations and the strike, did you have occasion to discuss with him his feelings concerning the union?

A. Stephen Brodeur worked for John Duckworth.

Q. Yes.

A. John Duckworth's office and my office connect, like one big room.

Q. Yes?

A. And one day –

Q. Excuse me, Mr. Duckworth has his own office there?

A. Yes.

Q. Okay.

A. Ya, and they was [sic] Steve Brodeur came in the

morning, and he mention about the union, and all the problem they have and walked down the stairs where he was talking – you know, he don't care about the union, but previous the negotiations this year, several time he mention to me personal that he don't – he doesn't like the union. He doesn't want the union.

Q. Mr. Brodeur said that to you?

A. Yes.

Q. Okay. And did you pass all of that information on to –

[355] A. Yes.

Q. – Mr. Auciello?

* * *

Q. On Paul McCarthy, had he obtained a job elsewhere? Do you know?

A. Yes, the morning of the 18 –

Q. Is this still November 18th?

A. November 18, 1988.

Q. Okay. Yes?

* * *

Q. Okay. And did he – either in that discussion or at any other time that year – state to you his feelings either for or against the union?

A. He was against the union. The main reason was because all the years the people was paid the dues, [356] they never saw not a percent of it. Only the time there with the – for the judge of the contract. The only people they saw all the time was the steward.

Q. And when did he say that to you?

A. Oh, maybe in the summer of the 1988.

Q. Okay. And did you pass all of that information on to Mr. Auciello?

A. Yes. When we was to do the meeting. Yes.

* * *

[358] Q. Okay. On Sang Nguyen – spelled S-A-N-G N-G-U-Y-E-N – did you have occasion to discuss with him, during the period of negotiations and the strike –

A. Sang was one of the three guys that resign the first night, and approach me if he could work because language barrier he has for communication, like I do.

I told – I think so, but I will check, and I mention it to Ralph, if the guys could go back to work right – right away, and Ralph said to me, that he has to check with you, and they draw – typed the letter the way for resign from the union and will have no – that way they have no trouble with the union.

* * *

[359] Q. Now, did Mr. Nyugen [sic] ever indicate to you, at that time or any other time, how he felt about the union?

A. He doesn't like a union. At the time he mention to me guys complaining was – I can't remember exactly word, but just because we talking everyday, the way express himself, I know full fact he – he doesn't like the union.

Q. And did he say this to you directly, or did you hear it from other –

A. No, directly.

Q. Okay.

A. Becuase see when I – after hours I see this guy.

Q. Okay. And was this during the period of the negotiations and the strike?

A. Previous and during the – the – the strike.

Q. Okay. And did you discuss this and pass this information on to –

A. I mention to –

Q. – Ralph?

A. – Ralph, the same was one other guy.

* * *

CROSS EXAMINATION

[362] Q. Mr. Degrandis, you say that some people talked to you about how they felt about the union?

A. Yes.

[363] Q. Did you ever ask anyone how they felt about the union?

A. No.

Q. Let's take the last person you talked about, Quang Nguyen. He told you what, again, about the union?

A. What I just mention before.

Q. You just said it a couple of minutes ago?

A. Ya.

Q. Can you repeat it, again, for me, please?

A. "F" the union. Was nice was no longer the union there. It was on a coffee time – coffee break.

Q. And that was about what day?

A. Oh, the day come back to work. I don't know if it was first day come back to work or the second day come back to work.

Q. The day he came back to work. Was that during the strike?

A. I just mentioned to Mr. O'Reilly, I don't remember if he come back before the strike or if the strike was over.

* * *

[370] JUDGE ZANKEL: If I were Mr. Morle, I would say to you that I have no use for this union? Is that [sic] kind of thing you say he told you?

THE WITNESS: Yes.

JUDGE ZANKEL: When?

THE WITNESS: Several time, even before the strike, way before the strike.

* * *

[372] JUDGE ZANKEL: – do you remember whether Mr. Cibelli told you that he had no respect for the union?

THE WITNESS: Yes.

JUDGE ZANKEL: When did he say that?

THE WITNESS: When he come back to the 18 – the 18 – November 18, when he have the meeting, and even previous – before.

* * *

GERALD SAUER

DIRECT EXAMINATION

[410] Q. Okay. Prior to the negotiations, did you receive any information concerning employee dissatisfaction with the union?

A. The only person that talked to me about dissatisfaction was Dick Boudreau.

[411] Q. And what did he say to you –

A. He –

Q. – and about when was this?

A. It was prior to the negotiations, either around the end of August or the [sic] around the beginning of September. Somewhere around the early part.

He – he came in with John Duckworth, and asked me what they needed to do to get rid of the union, and I told them to call up the NLRB.

Q. Okay.

A. They had – they were not – they asked me to look it up in the telephone book. I looked it up in the phone book. They had a photostat copy of the telephone number, and put the book away, and handed the photostat copy to John Duckworth.

Q. Did you make any further efforts to ascertain what, if anything – what was the gentleman's name again?

A. Richard Boudreau.

Q. What Mr. Boudreau did with this information?

A. He told me that he –

Q. I'm just asking you did you or did you not make any further inquiry?

A. No, I did not.

[412] Q. And did you ever hear anything further in that regard?

A. He – he told me that he called up the NLRB and got the paperwork on it.

Q. Okay. And did you make any further inquiry after that?

A. No, I did not.

* * *

APPENDIX C

[General Counsel's Exhibit 5]

AUCIELLO IRON WORKS INC.

METAL FABRICATORS

560 MAIN STREET
P.O BOX 424
HUDSON, MASSACHUSETTS 01749
508-568-8382

INDUSTRIAL
STRUCTURAL
ORNAMENTAL

October 14, 1988

To: Fellow Employees of Auciello Iron Works, Inc.

For the first time in the 56 years of my family's operating this company, [the union has forced our employees to go out on strike against the company. It is my information that our employees have been misinformed as to the scope of the management offer to settle this controversy.] Management is faced with a drastic increase in the cost of a medical program representing approximately 7% to 8% of the wage scale. The recently expired union agreement called for 25% of that increase to be absorbed by the employees with 75% to be absorbed by the company. The approximate cost of this increase is estimated to be between $.75 and $.85 per hour for each employee. In an effort to resolve this controversy, management yesterday offered to absorb that entire increase with nothing to be absorbed by the employees. In addition to this 7% to 8% increase, management offered to pay a 3% wage increase bringing the total package increase for the first year of this contract to over 10%. Additionally, management offered to pay a 4% increase in the second year and a 5% increase in the third year. This total package increase would be the highest in the industry. To our

amazement the union rejected that proposal and has now forced our employees into a strike position.

It appears this will be a long strike as we are not in a competitive position to pay more than what has already been proposed by management. Many of our employees have privately expressed a desire to continue working as they do not feel the union is representing their interests. My advice to any of you who wish to continue working is to take every step to avoid the union plan to assess fines against employees who work during this strike. Our attorney advises us that in the past the Union has been held in various cases to be entitled to impose fines on members working during the strikes. However, the Supreme Court has recently determined that in order to avoid fines by the Union, employees may tender their immediate resignations to the Union and may, thus,

1. Continue working during the strike and
2. Avoid any ability of the Union to retaliate against them by imposing fines.

Should any employee wish to take advantage of this procedure I have made available to each of you resignation forms. I do wish to make it clear, however, that while I welcome any employee who wishes to work during this strike, it is not a condition of your continuing to work that you resign from the Union and you are welcome to continue working whether you resign or not.

I am hopeful that we will eventually work all of these problems out either with or without the Union.

Sincrely,

Ralph Auciello

Date: _____

To Local 501

(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed: _____

(Auciello Iron Works, Inc., Hudson, MA)

[General Counsel's Exhibit 7]

Western Union
MAILGRAM

MAILGRAM SERVICE CENTER
MIDDLETOWN, VA. 22645
27 AM

4-0060308332002 11/27/88 ICS IPMMTZZ CSP BSNB
1 6178491688 MGM TDMT SOUTH BRAINTREE MA
11-17 0153P EST

SHOPMANS LOCAL UNION NUMBER 501
826 WASHINGTON ST
SOUTH BRAINTREE MA 02184

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

6178491688 FRB TDMT SOUTH BRAINTREE MA 56
11-27 0153P EST
ICS IPMFONE
RALPH AUCIELLO, 5088352441

33 KINGS MOUNTIAN DR
WEST BOYLSTON MA 01583
DEAR SIRS

AFTER CAREFUL CONSIDERATION THE PROPOSED CONTRACT SUBMITTED BY YOUR COMPANY ON NOVEMBER 17 1988 TO LOCAL UNION 501 HAS UNANIMOUSLY RATIFIED IN ITS ENTIRETY BY OUR NEGOTIATING COMMITTEE, THE STRIKE AT YOUR PLANT HAS CONCLUDED AS OF THIS DATE AND EMPLOYEES HAVE BEEN ADVISED TO RETURN TO WORK ON MONDAY NOVEMBER 28, 1988, SIGNED
DAVID M MORTIMER PRESIDENT OF LOCAL
UNION NUMBER 501

13:54 EST
MGMCOMP

[General Counsel's Exhibit 8]

Western Union
MAILGRAM

OREILLY AND GROSSO BC
1300 A WORCESTER RD
FRAMINGHAM MA 01701 28AM

4-0252688333003 11/28/88 ICS IPMBNGZ CSP B8NB
2 5088751220 MGM TDBN FRAMINGHAM MA
11-28 -331P EST

IRONWORKERS LOCAL 501
826 WASHINGTON ST
BRAINTREE MA 02184

THIS IS A CONFIRMATION COPY OF A TELEGRAM ADDRESSED TO YOU:

RE: AUCIELLO IRON WORKS

EMPLOYER POSITION IN RESPONSE TO YOUR NOTICE OF NOVEMBER 27 IS AS FOLLOWS: 1. EMPLOYER OFFER OF NOVEMBER 17 WAS REJECTED BY LOCAL 501 AND IS NO LONGER OPEN FOR UNILATERAL ACCEPTANCE. 2. IN ANY EVENT YOUR CLAIMED RATIFICAATION LIMITED TO NEGOATIATING COMMITTEE AND EXCLUDING RANK AND FILE MEMBERSHIP IS INSUFFICIENT, EMPLOYER NOW HAS REASON TO BELIEVE THAT LOCAL 501 NO LONGER REPRESENTS A MAJORITY OF EMPLOYEES IN THE APPROPRIATE UNIT AND THEREFORE DISAVOWS ANY OBLIGATION TO CARRY ON FURTHER NEGOTIATIONS.

JOHN D O'REILLY III
COUNCIL FOR AUCIELLO IRON WORK
1300A WORCESTER RD
FRAMINGHAM MA 01701

15:32 EST
MGMCOMP

[General Counsel's Exhibit 14]

AUCIELLO IRON WORKS INC.

METAL FABRICATORS

560 MAIN STREET
P.O BOX 424
HUDSON, MASSACHUSETTS 01749
508-568-8382

INDUSTRIAL
STRUCTURAL
ORNAMENTAL

BEFORE STRIKE

✓ Rocco Aliberti
✓ Salvatore Morle
Richard DeLarda ✓
James Hanagan ✓
✓ John Duckworth
✓ Robert cibelli
Joseph Parenti ✓ (2)
✓ Edward Winsor
✓ James Chiasson
✓ Stephen Brodeur
✓ Paul McCarthy
✓ Giao Huynh
✓ Gary Boudreau
✓ Kien Nguyen
✓ Sang Nguyen
Kenneth Seaver ✓
✓ Richard Boudreau
✓ Dave Duplisea
Michael Coyne ✓
✓ Paul Greenglass
✓ Quang Nguyen (?)
✓ Michael Barbour
✓ Phuc Tran

+3

[General Counsel's Exhibit 15]

CLOCK #	SHOP EMPLOYEES		YES CROSSED PICKET LINE	NO WILL NOT COME BACK (HAS ANOTHER JOB)	NOTES
19	Aliberti, Rocco	|		✓	
24	Morle, Salvatore	|	✓		WILL START DEC 5
26	DeLarda, Richard	|		✓	
64	Hanagan, James	|		✓	
67	Duckworth, John	ⓘ	✓		
101	Cibelli, Robert	|	✓		
142	Parenti, Joseph	|		✓	
144	Winsor, Edward	|		✓	
164	Brodeur, Stephen	ⓘ	✓		
172	McCarthy, Paul	|		✓	
178	Huynh, Giao Van	ⓘ	✓		
179	Boudreau, Gary	|	✓		
188	Nguyen, Kien	|	✓		
192	Nguyen, Sung	ⓘ	✓		
196	Seaver, Kenneth	|		✓	
201	Duplisea, David	|		✓	
202	Boudreau, Richard	|		✓	
204	Coyne, Michael	|		✓	
210	Chaisson, James	ⓘ	✓		
211	Greenglass, Paul	ⓘ	✓		
213	Nguyen, Quang	|	✓		
216	Barbour, Mike	ⓘ	✓		
223	Tran, Phuc Van	ⓘ	✓		
	LEE (NEW MAN)		✓		
	CLAYTON		14	9	
	MIKE CONLEY		1	1	
			15	10	= 23

[General Counsel's Exhibit 17]

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

TYPE OF ELECTION
(Check one)

☐ Consent Agreement
☐ Stipulation
☐ Board Direction
☒ RD Direction

(Also check box below where appropriate)
☐ 8(b)(7)

Case No. 1-RC-14,914

AUCIELLO IRON WORKS, INC.

Employer

and

SHOPMEN'S IRONWORKERS LOCAL UNION NO. 501 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO

Petitioner

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

Shopmen's Ironworkers Local Union No. 501
of the International Association of Bridge,
Structural and Ornamental Ironworkers,
AFL-CIO

and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT:

All production and maintenance employees of the Employer's plant located in Brighton, Massachusetts, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

Signed at Boston, Massachusetts
On the 30th day of March 1977

On behalf of
NATIONAL LABOR RELATIONS BOARD

/s/ Robert R. Fuchs
Regional Director, Region One
National Labor Relations Board

[SEAL]

[Respondent's Exhibit 2a]

Date: Oct. 13, 1988

To Local 501
(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed: /s/ Stephen C. Brodeur
STEPHEN C. BRODEUR

(Auciello Iron Works, Inc., Hudson, MA)

[Respondent's Exhibit 2b]

DATE: 10 13, 1988

TO LOCAL 501
(INTERNATIONAL ASSOC. OF BRIDGE, STRUC., & ORN. IRON WORKERS)
826 WASHINGTON STREET
BRAINTREE, MA. 02184

EFFECTIVE IMMEDIATELY I AM RESIGNING FROM THE UNION.

SIGNED,
/s/ Nguyen Sang Trung
NGUYEN SANG TRUNG

(AUCIELLO IRON WORKS, INC., HUDSON, MA.)

[Respondent's Exhibit 2c]

DATE: 10 - 13 - 1988

TO LOCAL 501
(INTERNATIONAL ASSOC. OF BRIDGE, STRUC., & ORN. IRON WORKERS)
826 WASHINGTON STREET
BRAINTREE, MA. 02184

EFFECTIVE IMMEDIATELY I AM RESIGNING FROM THE UNION.

SIGNED,
/s/ Phuc Van Tran
PHUC VAN TRAN

(AUCIELLO IRON WORKS, INC., HUDSON, MA.)

[Respondent's Exhibit 2d]

DATE: OCT, 13 - 88

TO LOCAL 501
(INTERNATIONAL ASSOC. OF BRIDGE, STRUC., & ORN. IRON WORKERS)
826 WASHINGTON STREET
BRAINTREE, MA. 02184

EFFECTIVE IMMEDIATELY I AM RESIGNING FROM THE UNION.

SIGNED,
/s/ Giao Huynh

(AUCIELLO IRON WORKS, INC., HUDSON, MA.)

[Respondent's Exhibit 3a]

Date: Oct 14/88

To Local 501
(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed: /s/ James P. Chiasson
JAMES P. CHIASSON

(Auciello Iron Works, Inc., Hudson, MA)

[Respondent's Exhibit 3b]

Date: 10/14/88

To Local 501
(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed: /s/ Paul N. Greenglass
PAUL N. GREENGLASS

(Auciello Iron Works, Inc., Hudson, MA)

[Respondent's Exhibit 3c]

Date: 10 - 14 - 88

To Local 501
(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed: /s/ John Duckworth
JOHN DUCKWORTH

(Auciello Iron Works, Inc., Hudson, MA)

[Respondent's Exhibit 3d]

Date: OCT 17, 1988

To Local 501
(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed: /s/ Michael G. Barbour
MICHAEL G. BARBOUR

(Auciello Iron Works, Inc., Hudson, MA)

[Respondent's Exhibit 3e]

Date: NOV 21, 1988

To Local 501
(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed: /s/ Robert Cibelli

(Auciello Iron Works, Inc., Hudson, MA)

[Respondent's Exhibit 3f]

Date: NOV 21 / 88

To Local 501 .
(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed: /s/ Quang Nguyen

(Auciello Iron Works, Inc., Hudson, MA)

[Respondent's Exhibit 3g]

Date: 11/21/88

To Local 501
(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed: /s/ Gary F. Boudreau
(Auciello Iron Works, Inc., Hudson, MA)

[Respondent's Exhibit 3h]

Date: 11 - 23 - 88

To Local 501
(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed /s/ [Illegible] Duplisea
(Auciello Iron Works, Inc., Hudson, MA)

[Respondent's Exhibit 4]

Date: 10 – 14 – 88

To Local 501
(International Assoc. of Bridge, Struc., & Orn. Iron Workers)
826 Washington St.
Braintree, MA 02184

Efective Immediately I am resigning from the union.

Signed: /s/ Frank J. Tomolillo
(Auciello Iron Works, Inc., Hudson, MA)

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 19, 1996

Mr. John D. O'Reilly III
77 Turnpike Road
Post Office Box 3118
Southborough, MA 01745-0118

Re: Auciello Iron Works, Inc.
v. National Labor Relations Board
No. 95-668

Dear Mr. O'Reilly:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 1, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 29, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.

Sincerely,
/s/ William K. Suter
William K. Suter, Clerk

Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

(4)

No. 95-668

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

AUCIELLO IRON WORKS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

JOHN D. O'REILLY, III
(Counsel of Record)
O'REILLY & GROSSO
77 Turnpike Road
Post Office Box 3118
Southborough, MA 01745
(508) 460-1500
Counsel for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 328-3298

48 pp

QUESTION PRESENTED

Whether an Employer is bound by a Union's "acceptance" of an earlier Employer proposal for a collective bargaining agreement when, at the time of the Union's "acceptance", the Employer had a reasonable basis for a good faith doubt of the Union's continued majority status, and expressed that doubt within a reasonable period of time after being advised of the final erosion of Employee support for the Union, but less than one day after the Union had telegraphed its "acceptance".

PARTIES TO THE PROCEEDING

National Labor Relations Board

Auciello Iron Works, Inc.*

---

* In accordance with Rule 29.6, Auciello Iron Works, Inc. hereby discloses that it has no parent company, affiliates or subsidiaries.

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ARGUMENT 13

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No. 95-668

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

AUCIELLO IRON WORKS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals dated July 21, 1995 is reported at 60 F.3d 24 (Pet.App. 1a).[1] A copy of the Supplemental Decision and Order of the

[1] References to the Joint Appendix are designated as "App." followed by the appropriate page number(s). References to the Appendix to the Petition for Writ of Certiorari are designated as "Pet. App." followed by the appropriate page number(s).

National Labor Relations Board dated May 9, 1995 is reported at 317 NLRB No. 60 (Pet. App. 9a). The earlier decision of the First Circuit Court of Appeals dated November 30, 1992 is reported at 980 F.2d 804 (Pet. App. 59a). The original Decision and Order of the National Labor Relations Board, incorporating by reference the original Decision of the Administrative Law Judge of November 24, 1989, is reported at 303 NLRB No. 90 (Pet. App. 84a).

JURISDICTIONAL STATEMENT

On July 21, 1995, the First Circuit Court of Appeals entered its Judgment and Opinion, enforcing the Supplemental Decision and Order of the National Labor Relations Board dated May 9, 1995. Petitioner's Petition for Writ of Certiorari was filed on October 19, 1995. The Court granted the Petition on January 19, 1996. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves consideration of Section 7 and Sections 8(a)(1),(2) and (5) and 8(b)(1) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C., §157, §§158 (a)(1),(2),(5) and 158(b)(1).

Section 7 of the NLRA, 29 U.S.C. §157, provides:

> Employees shall have the right to self-organization, to form, join, or

> assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sections 8(a)(1), (2) and (5) of the NLRA, 29 U.S.C. §§158(a)(1), (2) and (5) provide:

> (a) It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> (5) to refuse to bargain collectively with the representatives of his em-

ployees, subject to the provisions of section 9(a).

Section 8(b)(1) of the NLRA provides:

(b) It shall be an unfair labor practice for a labor organization or its agents -

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prrescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

STATEMENT OF THE CASE

The factual background to this case is virtually undisputed and was summarized by the United States Court of Appeals for the First Circuit in its original November 30, 1992 Decision at 980 F.2d 805 to 807. (Pet. App. 60a-65a)

The Employer maintains an iron works fabrication shop located in Hudson, Massachusetts, and had enjoyed an amicable collective bargaining relationship with Local 501 of the Iron Workers' Union for a number of years. A series of collective bargaining agreements had been negotiated without incident over those years. The

most recent agreement expired in September 25, 1988. After several negotiating sessions in 1988, a final Employer proposal, which the Union agreed to submit to the membership for approval, was rejected by the membership and the parties continued to bargain until October 13, 1988, when a second Employer proposal was presented to the membership and was rejected with a strike vote taken, resulting in a strike commencing on October 14, 1988 and with picket lines being placed at the Employer's plant. Some four weeks into the course of the strike and the picketing activity, a gradual erosion of employee support for the Union was evidenced, so that by the final week of the strike, the Employer noticed an increased deterioration of Union support. The factual basis upon which the Employer relied for its growing belief that the Union might no longer maintain strong support of the bargaining unit was the fact that several employees had elected to cross the picket line, and/or had resigned from the Union and, more importantly, had made direct comments to upper management supervisory employees, affirmatively reflecting the bargaining unit employees' lack of support for the Union. As a result of the Employer's feeling that the support for the Union was on the downslide, the Employer, at the last negotiating session between the parties on November 17, 1988, advanced a proposal which incorporated by reference some earlier points on which agreement had been reached, but which took a harder line on other points. The Union then terminated the negotiating session, and over the course of the next week, the Employer

observed additional factors which supported its earlier impression that the Union's support was rapidly deteriorating.

The picket line was withdrawn the next day, Friday, November 18, 1988, and on that day and throughout the following week of November 21, 1988, the balance of the employees returned to work and additional employees continued to make strong comments to management representatives, indicating their lack of any continuing support for the Union. Also during that week of November 21, 1988, a number of additional employees resigned from Union membership. Not only did these returning employees affirmatively express lack of support for the Union during the week of November 21, 1988, but other employees, including the Union Steward, who were presumed to have supported the Union, indicated to the company that they would not be returning, and had obtained permanent employment elsewhere. Set forth in the appendix hereto at page App. 1-2 is a summary of those employees who, after the withdrawal of the Union picket line on Friday, November 18, 1988, and throughout the week of November 21, 1988, affirmatively indicated to the company their lack of support for the Union, including their resignation from the Union, as well as a list of employees who had been supporting the Union and who advised the company that same week that they were not returning to work, as they were permanently employed elsewhere. While the Employer was in the process of assessing these dramatic events occurring during that week, and was in the process of reviewing what, if any, actions

would be appropriate in view of this now-apparent final erosion of employee support for the Union, the Union sent a Sunday evening (App. 17a, 65a) telegram to the home of the company president on November 27, 1988, purporting to "accept" the management offer of November 17, 1988, which offer had been made prior to: (a) the withdrawal of the picket line; (b) the return to work of a number of employees; (c) the withdrawal from Union membership by additional employees; (d) the increased expressions of dissatisfaction with the Union being made by employees; and (e) the determination that some employees who had been supporting the Union would not be returning to work, as they were permanently employed elsewhere. Management representatives met with their attorneys the following Monday morning, November 28, 1988, and reviewed the Employer's revised assessment as to the now-complete lack of employee support for the Union, and immediately advised the Union that it would no longer recognize the Union as the exclusive bargaining representative of the employees, and, in view of the Union's clear lack of support among employees, its prior contract proposal was no longer available for "acceptance". (App. 66a)

Based on an Unfair Labor Practice Charge filed with the Regional Office of the National Labor Relations Board alleging a statutory refusal to bargain by the Employer's refusal to consider itself bound by the Union's "acceptance" of the earlier management proposal, the Regional Office of the Board issued a Complaint on January 17, 1989, alleging the Employer violated

the Act by withdrawing recognition from the Union and by refusing to execute an agreement with the Union.

Hearings were conducted before Administrative Law Judge Zankel on June 21, August 8 and August 9, 1989, and on November 24, 1989, the Administrative Law Judge issued a decision that the issue of the Employer's good faith doubt of the majority status of the Union was, in fact, immaterial, as the Union had "accepted" the Employer's proposal immediately prior to the Employer's withdrawal of recognition. The Administrative Law Judge determined that a collective bargaining agreement between the Employer and the Union came into existence upon the Union's transmittal of its Sunday evening, November 27, 1988, telegram purporting to "accept" the Employer's last proposal, and that the Employer's withdrawal the following day of recognition and refusal to execute an agreement was, therefore, unlawful. (Pet. App. p. 84a)

Approximately a year and a half later, on June 27, 1991, the National Labor Relations Board issued a three-paragraph Order affirming the Administrative Law Judge (Appendix, p. 84a). In connection with the NLRB attempting to seek enforcement of that Order in the United States Court of Appeals for the First Circuit, the Court affirmed a number of aspects of the NLRB Order, but agreed with the Employer that the NLRB decision which had merely cited prior NLRB determinations dealing with instances where the Union's lack of support had arisen only <u>after</u> the making of

the agreement, and were, therefore, not a basis for ruling on a factual situation involving a Union's lack of support which existed <u>at the time</u> of the Union's efforts to "accept" the Employer's earlier proposal, had not adequately dealt with the factual issues presented by this case. The Court determined that the Board had "glossed over" what the Court determined to be the "tough question" presented in this case, namely whether a contract must be irrebuttably presumed, where the Union effort to accept an earlier Employer proposal came at a time when the Union clearly lacked majority support. The First Circuit noted a then-recent decision of the Seventh Circuit Court of Appeals determining that an earlier management proposal was no longer available for "acceptance" by a Union which had clearly lost its majority support of the workers. <u>Chicago Tribune Co. v. NLRB</u>, 965 F.2d 244 (7th Cir. 1992).

The First Circuit Court of Appeals further noted that in recent decisions, both before this Court[2] as well as before the Eleventh Circuit[3], the Courts had become involved in the issue of whether the Employer had, in fact, a good faith doubt of the continued Union's majority in cases factually identical to the instant case, namely, when that good faith doubt was

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[2]<u>NLRB v. Curtin Matheson Scientific</u>, 494 U.S. 777 (1990)

[3]<u>NLRB v. Bickerstaff Clay Prods. Co.,</u>, 871 F.2d 980 (11th Cir. 1989)

first raised by the Employer only immediately after the allegedly minority Union had attempted to "accept" an earlier management proposal, and those Courts, unlike to Board in this case, had, in fact, determined the issue based on the legitimacy of the Employer's good faith doubts of the Union's majority status. The matter was remanded by the First Circuit to the NLRB to address the apparent inapplicability of the prior Board precedent cited in its June 27, 1991 decision, as well as to address the apparent inconsistencies in the approach taken in prior matters, both with this Court as well as with the Eleventh Circuit, and to address the impact of the Seventh Circuit Court of Appeals decision in Chicago Tribune, *supra*, that an Employer's offer is no longer available to the Union whose majority support has been clearly eroded subsequent to the tendering of the earlier management proposal. The Board was specifically directed by the First Circuit to "act with expedition" and to forward a copy of its Supplemental Decision to the Clerk of the First Circuit "as soon as it can". (Pet. App. p. 83a)

Notwithstanding the First Circuit's mandate to rule on this matter expeditiously, it took the Board a full two and one-half years to finally issue its Supplemental Decision and Award wherein it determined that, for policy considerations of "industrial stability" and "employee freedom of choice", the presumption of majority status must prevail until the Employer expressly challenges that majority status. It further determined that, if an Employer has a good faith doubt as

to the Union's continued majority status, it must initially raise that issue before the Union accepts its offer. In the factual context of this case, the Board's decision, in essence, stated that the fact that the Union moved quicker than the Employer by sending a Sunday evening telegram to the home of the company's president before the management's announcement of withdrawal of Union recognition, in the face of complete and obvious erosion of any Union support, on the following day, a Monday morning, was dispositive of the case, and precluded the Employer from presenting evidence that, at the time of the Union's "acceptance", the Employer had a legitimate doubt of the Union's majority status. (Pet. App. 9a)

The matter was again reviewed by the United States Court of Appeals for the First Circuit on July 21, 1995 and it was determined that, in view of the Board's finally having announced an articulated policy-oriented basis for its determination, the Court would affirm that ruling. The Court specifically noted that, in adopting the Board's rule that an Employer may not raise the issue of the Union's majority status once the Union has "accepted" an earlier management proposal (even though the Employer attempts to raise this issue within a day or, in theory, within an hour after the Union's "acceptance") the First Circuit was reaching "a result different from that by our sister circuit in Chicago Tribune Co." (App. p. 7a).

SUMMARY OF ARGUMENT

This case presents the intriguing issue of whether the established policy of according to a Union an irrebuttable presumption of majority status once a collective bargaining agreement has been reached, should also apply to situations such as this, where, at the time the "agreement" has been reached via the Union's somewhat unorthodox actions in sending a Sunday evening telegram of acceptance in an apparent effort to prevent the Employer from fully assessing the impact of the sudden erosion of Union support, the Employer has not had a realistic and reasonable opportunity to assert an expression of its good faith doubt of the Union's continued majority status. The traditional purpose in establishing such an irrebuttable presumption of continued Union majority status is to preserve a legitimately created and lawfully continued bargaining relationship between the parties. Such an irrebuttable presumption has no place in a factual situation such as is involved here, where the asserted collective bargaining relationship which the Board contends created an irrebuttable presumption of Union majority status was fictitiously created at a time when: (a) the Employer had a basis for believing the Union no longer maintained a majority status; and (b) the Employer had not had a reasonable opportunity to assess the rapidly eroding Union support or to express its doubt as to the Union's continuing majority status.

The Board's determination that an Employer's prior offer for a collective bargaining agreement remains available for acceptance by a Union who, subsequent to the offer having been made, has lost its majority support among employees is so irrational, in view of the objectives of the Act to protect employees' Section 7 rights and to prevent and prohibit Employers from entering into agreements with minority Unions, that it should not be confirmed by this Court. In similar contexts, both the Board, as well as various reviewing Courts, have allowed Employers to introduce affirmative evidence establishing a lack of majority status at the time the "agreement" was reached, and have rejected arguments that once the "agreement" has been reached, the irrebuttable presumption of continued Union majority status prevents the consideration of any Employer contention that, in fact, at the time of the "agreement", the Union was lacking a majority status.

ARGUMENT

I.

WHERE A UNION, WHOSE SUPPORT HAS RAPIDLY DETERIORATED SINCE THE EMPLOYER'S LAST CONTRACT OFFER WAS MADE, SUDDENLY COMMUNICATES ITS "ACCEPTANCE" OF THAT LAST OFFER, THE EMPLOYER SHOULD BE ENTITLED TO RAISE ITS DOUBT AS TO THE UNION'S MAJORITY STATUS AS OF THE DATE OF THE UNION'S "ACCEPTANCE".

The factual situation involved in this case is a recurring one, wherein during

the course of a prolonged strike, the parties continue to negotiate and, when the gradually eroding employee support for the Union reaches a low ebb, the Union is generally inclined to grab "whatever it can" by attempting to "accept" the most recent Employer proposal[4], even though that Employer proposal was likely made by the Employer at a time when either: (1) the Union's support among bargaining unit employees was greater; or (2) the employer may not have been fully aware of the extent of the Union's lack of employee support. Where, as in this case, the Union's "acceptance" of the earlier Employer offer literally comes out of the blue and is sent in such apparent panic circumstances by being telegraphed on a Sunday evening to the home of the company's president only a few days after the final indicia of any employee support for the Union has vanished, the Employer is placed in a position where it must make a rapid assessment and determination of whether, at the time of the Union's effort to capture the benefit of a prior Employer proposal, the Union was, in fact, a representative of a majority of the bargaining unit employees. Prior decisions of other Circuit Courts of Appeals as well as the decision

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[4]In the very similar circumstances involved in Viking Lithographers, 184 NLRB 139 (1970), the Board had referred to such telegrams of "acceptance", sent at a time when the Union's employee support had clearly evaporated, as a "capitulated . . . contractual surrender", sent in the Union's "haste to secure its bargaining status", which would not place any obligation on the Employer to accept.

of this Court in NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990) have determined that the critical issue in such circumstances, where the Employer, after receiving such a Union attempt to "accept" a prior offer in the face of eroding employee support, is whether the Employer may reject in a timely fashion such an "acceptance" based on the Employer's good faith belief that the Union, at the time of its "acceptance", no longer possessed the support of a majority of the bargaining unit employees. Unlike the decision in this Court in Curtin Matheson Scientific and unlike the Seventh Circuit Court of Appeals' decision in Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992), and unlike the Eleventh Circuit Court of Appeals' decision in NLRB v. Bickerstaff Clay Prods. Co., 871 F.2d 980 (11th Cir. 1989), the First Circuit Court of Appeals determined that the question of the Employer's good faith doubt of the Union's majority status at the time of receiving such a telegram "acceptance" is immaterial, as the agreement is fully consummated by the Employer's receipt of the Union's "acceptance", and that "agreement" constitutes an irrebuttable presumption of the Union's majority status. Thus, the decision of the First Circuit Court of Appeals in this case is inconsistent with at least two other Circuits, as well as with the rationale of this Court.

In NLRB v. Bickerstaff Clay Prods. Co., 871 F.2d 980 (11th Cir. 1989), cert. den. 493 U.S. 924 (1989), the Employer's last offer of November 6 was not accepted but, after further deterioration of the Union's

majority status, was "accepted" by a Union telegram on April 8th. As in the instant case, one day after receiving this "acceptance", management withdrew recognition from the Union and advised the Union that the prior offer was no longer available for "acceptance." While, unlike the instant case, both the Administrative Law Judge and the National Labor Relations Board decided the matter on the question of whether this subsequent expression by the Employer of its doubt of the Union's majority status was, in fact, based upon a good faith doubt, based on objective considerations (a matter which, in this case, the Board and First Circuit are now saying is immaterial, in view of the Union's having sent its "acceptance" one day prior to the Employer's withdrawal of recognition), the Board did argue before the Eleventh Circuit Court of Appeals, as it did in the instant case, that the prior offer of the Employer remained available for "acceptance", notwithstanding the Employer having reasonably concluded in the meantime that the Union no longer represented a majority of the bargaining unit employees. According to the Board's argument in that case, the Employer's offer would be available for such "acceptance" until such time as the Employer expressly either withdrew the offer or withdrew recognition. The Eleventh Circuit Court of Appeals, unlike the First Circuit Court of Appeals in the instant case, determined that there was no such obligation to either withdraw the offer or withdraw recognition.

> "There is no authority cited by the Board, and none exists, for the proposition that withdrawal of a prior offer is a condition precedent to an employer's withdrawal of recognition based on a good faith doubt of the Union's majority status. If the circumstances changed such that the Employer reasonably believed that the Union no longer represented a majority of its employees on April 8, 1986, Bickerstaff had no duty to withdraw its offer by notifying the Union." NLRB v. Bickerstaff Clay Products, 871 F.2d 980, 993-994 (11th Cir. 1989)

The Court of Appeals in that case went on to determine that the Employer was within its rights in rejecting the Union's telegram "accepting" the Employer's prior offer and in withdrawing recognition from the Union, even though this was not done, as in the instant case, until one day after the Union had "accepted" the Employer's prior offer. This decision is, thus, clearly inconsistent with the First Circuit's decision in this case that, notwithstanding an Employer's legitimate, good faith doubt of the continuing majority status of the Union, it is bound by a Union "acceptance" of the Employer's most recent proposal.

Similarly, in Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992), the Employer had engaged in a number of collective bargaining sessions with the Union and, after becoming aware of the nearly complete erosion of the Union's support among employees, had not specifically

withdrawn its earlier offers to the Union. It was only several days after the Union's eventual "acceptance" of the Employer's earlier offer that the Employer, for the first time, formally took the position that at the time of the Union's "acceptance", it no longer represented a majority of the employees. As in the instant case, the National Labor Relations Board took the position that the acceptance of the Employer's earlier offer bound the Employer to a collective bargaining agreement, and it was too late for the Employer to maintain that, at the time of that "acceptance", the Union no longer represented a majority of the employees. That position was rejected by the Seventh Circuit Court of Appeals on the basic rationale that an Employer may not legally consummate an agreement with a Union when, at the time of that "consummation", the Employer has reason to believe that the Union does not represent a majority of its employees. The Seventh Circuit Court of Appeals also placed great emphasis on the fact that to allow a Union to suddenly grasp an earlier Employer offer at a time when the Union's support has disappeared and, simply because the Employer has not formally withdrawn either the offer or its recognition of the Union, to force its employees to be bound by a collective bargaining agreement with a Union with whom they no longer have any allegiance is unduly and unnecessarily penalizing those employees. The Court drew careful distinctions between situations such as those involved in this case where, in the absence of any bad faith bargaining by the Employer, the Employer simply had not

formally withdrawn its prior offer or Union recognition in the face of the Union's eroding support, and cases where the Employer refuses to comply with its statutory obligation to bargain in good faith and, as the result of such refusal, the employee support eventually erodes. The Court suggested that in the latter case, the Employer would not be in a position to reject the Union's acceptance of any Employer offer, as the Employer itself has illegally contributed to the erosion of the Union's support. There is no suggestion that any such circumstances existed in the instant case. The Court of Appeals for the First Circuit in the instant case expressly acknowledged that its determination would be contrary to this decision of the Seventh Circuit Court of Appeals in Chicago Tribune. (App. p. 7a)

The facts of the instant case are also remarkably similar to those involved in NLRB v. Curtin Matheson Scientific, 859 F.2d 362 (5th Cir. 1988) rev'd. 494 U.S. 777 (1990). In that case, the Employer had made an offer to the Union on June 12th, and after serious erosion of Union support, the Union finally "accepted" the offer on July 16th. Four days later, the Employer declined the Union's "acceptance" and, for the first time, formally announced its withdrawal of that earlier offer, based on its doubts as to the Union's majority status as of the date the Union purported to "accept" the Employer's offer. The Fifth Circuit Court of Appeals determined that on those facts, there was no violation of Sections 8(a)(1) and 8(a)(5) by the Employer refusing to execute an

agreement, and by withdrawing its recognition of the Union. Most significantly, unlike the Court of Appeals in the instant case, it did not consider a legitimate agreement to have been entered into simply by the Union's attempting to "accept" the Employer's last proposal. Obviously, if the Fifth Circuit had felt that the mere "acceptance" by the Union of the earlier Employer offer resulted in an "agreement", there would have been no need for the Court of Appeals even to have considered the legitimacy of the Employer's claim, made four days after this "acceptance" as to the Union's lack of majority status.

On appeal, a majority of this Court determined that the Employer's asserted basis for its contention that the Union no longer maintained a majority status (the existence of a number of striker replacements which the Employer had assumed did not support the Union) was not a legitimate basis for the Employer's withdrawal of recognition. But, under the rationale of the First Circuit in the instant case, there would have been no need to have even reached that issue if the Union's "acceptance" of the Employer's earlier offer constituted a binding agreement, regardless of the Employer's feeling that the Union then no longer enjoyed a majority status.

Similarly, the extended dissenting opinions of four members of this Court determining that the Employer had not violated the statute by refusing to execute an agreement with the Union necessarily assumed that a binding contract was not

consummated simply by the Union's "acceptance" of the Employer's earlier offer. 494 U.S. at 798, 801

Thus, the eventual determination of the Board, as affirmed by the First Circuit Court of Appeals, that the Employer's claim of a good faith doubt of the Union's majority status should not even be considered if that claim is formally announced the day after the Union's telegram of "acceptance" is immaterial, is inconsistent with the manner in which this Court and other Circuits have dealt with that same factual situation.

II.

THE BOARD RULING THAT AN "AGREEMENT" CREATED BY A UNION'S "ACCEPTANCE" CREATES AN IRREBUTTABLE PRESUMPTION OF THE UNION'S MAJORITY STATUS, THUS RENDERING IMMATERIAL THE EMPLOYER'S EVIDENCE OF THE UNION'S ACTUAL LACK OF MAJORITY STATUS, IS INCONSISTENT WITH THE DOCTRINE THAT THE CREATION OF SUCH A MAJORITY STATUS PRESUMPTION MUST HAVE BEEN LEGITIMATELY AND LAWFULLY ESTABLISHED.

This Court has approved in various circumstances the Board's creation of either irrebuttable or rebuttable presumptions of a Union's majority status. For example, a Union certified by an NLRB election is irrebuttably presumed to have a majority status for a one-year period after the Board certification; after that one-year period, its majority status has only a rebuttable presumption, and the Employer may properly raise, after that one-year

period, a claimed good faith doubt as to the majority status of the Union. NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990); Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27, 37 (1987)

Similarly, a Union who has entered into a valid collective bargaining agreement with an Employer is irrebuttably presumed, during the course of that agreement, to have a majority status among bargaining unit employees; after the expiration of that collective bargaining agreement and during the course of negotiations for a successor agreement, the Union is deemed only to have a rebuttable presumption of a majority status. NLRB v. Ironworkers, 434 U.S. 335, 343 (1978)[5]

To the same effect, a Union who enters into a recognition agreement with an Employer is irrebuttably presumed to have a majority status for "a reasonable time" after that recognition agreement is reached. The rationale for such a policy creating presumptions of majority status

[5]In this case, while there was an NLRB Certification in 1977, (App. 69a), the rebuttable presumption of the Union's majority status which was applicable in the 1988 negotiations was based on the recently-expired agreement, and not on the earlier Certification. (Indeed, none of the 1988 employees were even employed at the time of the 1977 Certification. (App. p. 55a) Similarly, the "irrebuttable presumption" upon which the Board is now relying so as to preclude the Employer's evidence of the Union's loss of majority is the "contract" created by the Union's November 27, 1988 telegram; it is not based on the original 1977 Certification.

is that "a bargaining relationship, once rightfully established, must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed". Franks Bros. v. NLRB, 321 U.S. 702, 705 (1944) This Court has more recently noted that this type of presumption of majority status is intended to "promote stability in collective-bargaining relationships, without impairing the free choice of employees". Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27 (1987) Obviously, the creating of an irrebuttable presumption of Union majority status will have an unavoidable impact of infringing on the ability of bargaining unit employees to engage in activity otherwise protected by Section 7 of the Act, such as challenging an incumbent Union's majority status or in seeking certification by another Union or in attempting to refrain from Union activity. However, as this Court noted in NLRB v. Financial Institution Employees of America, 471 U.S. 1098 (1986), the preference for industrial stability created by lawful collective bargaining relationships must prevail over the incidental impact the protection of collective bargaining relationships may have on the ability of the employees to engage in otherwise available Section 7 activities. Moreover, while that deprivation of Section 7 rights might be justified in order to protect legitimate collective bargaining relationships, it is an impermissible infringement on Section 7 rights and a clear violation of

the principles of Section 8(a)(2)[6] of the Act to extend such a presumption of majority status to relationships which are based on Union agreements unless the Union agreement itself was lawfully entered into; where the agreement was not lawfully entered into, such an agreement should not serve as the vehicle for the creation of such majority status presumption, so as to deprive employees of their Section 7 rights.

For example, in Royal Coach Lines v. NLRB, 838 F.2d 47 (2nd Cir. 1988), the Employer had entered into a recognition agreement with the Union. Such an agreement ordinarily would create an irrebuttable presumption of Union majority status, at least for a "reasonable period of time". In that case, the Employer, upon being advised that at the time of the recognition agreement, the Union, in fact, did not represent a majority of its employees, immediately repudiated the agreement and disavowed any obligation to deal with the Union, based on its good faith doubt that the Union had not represented a majority of the employees. The Second Circuit Court of Appeals acknowledged the general irrebuttable presumption of the Union's majority status flowing from such agreements, but indicated that the general

[6]Under Sections 8(a)(2) and 8(b)(1),, it is clearly illegal for an Employer or Union to negotiate or enter into an agreement when the Union does not represent a majority of the employees. International Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 732-733 (1961)

rule for the operation of presumptions of Union majority status "must be limited to those bargaining relationships that have indeed been 'lawfully established'". The Second Circuit quoted language from an earlier decision in NLRB v. Cayuga Crushed Stone, 474 F.2d 1380 (2nd Cir. 1973), where the presumptions flowing from a Union recognition agreement were limited to those agreements which were "valid" at the time of their consumption. The court also noted in its earlier decision in NLRB v. All Brand Printing Corp., 594 F.2d 926, 929 (2nd Cir. 1979), that the basis for this presumption of Union majority status must be a "valid" agreement. This Court, in Franks Bros. v. NLRB, 321 U.S. 702 (1944), indicated that the collective bargaining relationships which are to be protected by the aforesaid presumptions of majority status must have been "rightfully established" in order to receive the protection of such presumptions. Otherwise, "the interest in protecting bargaining relationships could not justifiably outweigh the burdens on employee freedom that flow in some circumstances from the imposition of a period of irrebuttably presumptive Union majority support". Royal Coach Lines, 838 F.2d 47 at 52.

The Board itself has noted the distinction that must be drawn between creating presumptions of Union majority status from valid agreements, as opposed to those which are invalid as a result of the Union not maintaining a majority status as of the time of the entering into of the contract. In Moisi & Son Trucking, 197 NLRB 198, (1972), it was determined that an

Employer who has entered into a voluntary recognition agreement with the Union is faced with an irrebuttable presumption that the Union represents a majority of its employees, and must deal with the Union for a reasonable period of time, "unless he introduces affirmative evidence proving a lack of majority at the time of the recognition agreement". (Emphasis added)

III.

EVEN IF A REQUIREMENT EXISTED THAT AN EMPLOYER, SUDDENLY FACED WITH THE BASIS FOR ASSERTING A DOUBT OF THE UNION'S MAJORITY STATUS, MUST WITHDRAW ANY OUTSTANDING CONTRACT PROPOSALS, IT SHOULD BE AFFORDED A REASONABLE PERIOD OF TIME TO WITHDRAW OUTSTANDING CONTRACT PROPOSALS OR TO ASSERT ITS DOUBT OF THE UNION'S MAJORITY STATUS.

Under the Board's own guidelines, an Employer's offer for a collective bargaining agreement will remain available for acceptance until it is expressly withdrawn, unless circumstances arise which would lead the parties to reasonably believe that the offer was no longer available, or "unless there are intervening circumstances which would make it unfair to hold the company to its offer." Pepsi Cola Bottling Co. v. NLRB, 659 F.2d 87, 89-90 (8th Cir. 1981) One of the circumstances that could frequently arise between the making of such an offer and the Union's subsequent attempt to "accept" that offer is the loss of the Union's majority status and, as noted above, (pp. 15-16), the Eleventh Circuit Court of Appeals has expressly noted that in those circumstances, the Employer has no duty to withdraw its offer from what has now become a minority Union. NLRB v. Bickerstaff Clay Prods., 871 F.2d 980, 993-994 (11th Cir. 1989)

Moreover, even if the Board were to administratively create such a duty, common sense dictates that the time within which an Employer must withdraw its offer should be dictated by the circumstances which have led the Employer to believe that the Union no longer maintains its majority status. Obviously, an Employer who has made a prior contract offer to the Union and is subsequently presented, for the first time, with compelling evidence which would serve as the basis for a good faith belief on its part that the Union no longer maintains a majority status, should not be held committed to a Union contract if the Union, within minutes or hours of the Employer's receiving that information, telegraphs its "acceptance" of the Employer's offer. The Employer should have a reasonable opportunity not only to investigate and verify the information, which, if confirmed, would serve as the basis for the Employer's good faith doubt of the Union's majority status, but the Employer should also have a reasonable period of time to communicate its good faith doubt to the Union. Clearly, if the Employer prematurely and without properly investigating and verifying the information that could lead to a good faith doubt of a Union's majority status, withdraws recognition from the Union, it has exposed itself to an unfair labor practice charge.

NLRB v. Laverdiere's Enterprises, 933 F.2d 1045, 1051-1053 (1st Cir. 1991); Bolton-Emerson v. NLRB, 899 F.2d 104, 106 (1st Cir. 1990) The need for the Employer to have at least a reasonable opportunity to assess the factual basis for any possible belief that the Union no longer maintains majority status is emphasized by the fact that if it were to continue to recognize and deal with a Union, after becoming aware of the basis for a belief that the Union no longer maintains a majority status, it has violated Section 8(a)(2) of the Act. International Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 732-733 (1961) It would be an unfair and unreasonable requirement to place a burden upon the Employer to have to go through the difficult and prolonged process of accurately evaluating the current majority status of the Union (at the peril of incurring possible Unfair Labor Practice charges)[7] and then to have to decide whether or not to formally announce its disavowal of its obligation to deal with that Union within a matter of hours or even days of the Employer's first receiving the factual information which could

---

[7]The dilemma faced by an Employer having to determine when it is permissible to assert its good faith doubt that the Union no longer maintains a majority status is demonstrated in the instant case where the Board's decision implies that the Employer waited too long to announce its decision, yet General Counsel, before the Administrative Law Judge, argued at length that, even as of November 28th, when the Employer announced its good faith doubt, the Employer did not yet have a sufficient factual basis for that good faith doubt.

serve as a possible basis for the conclusion that the Union no longer enjoyed a majority status.

While in this case, the Board is attempting to depict the Employer as one casually "sitting back" and methodically deciding if and when it will announce it's doubt of the Union's continuing majority status, or whether it will continue to negotiate with a minority Union in an attempt to obtain a more favorable contract (Pet. App. p.36a), the facts of this case clearly negate any such reference and demonstrate the need for allowing at least a reasonable period of time for an Employer to assess and evaluate the facts creating a possible good faith doubt of the Union's majority status. While the Employer had limited information that several months prior to the strike, one or two employees had expressed dissatisfaction with the Union (App. p. 31a, 46a, 60a), and that some employees had crossed the picket line and resigned from the Union (App. p. 9a, 13a, General Counsel Exhibits 2a, b, c, d, 3a, b, c, d, 4) and that a few strike replacements had been hired (App. p. 40a), it certainly had far less than an adequate basis for disavowing an obligations to deal with the Union as of November 17, 1988, when it made its last offer to the Union. As the Board has ruled on a number of occasions, the mere fact of several employees crossing a picket line and re-signing from the Union and several additional employees being hired as strike replacements is an inadequate basis for refusing to recognize the Union. Station KKHI, 284 NLRB No. 113 (1987);

John's-Manville Sales Corporation, 289 NLRB No. 40 (1988); Wallkill Valley General Hospital, 288 NLRB No. 18 (1988) It was only after the Union withdrew its picket line during the day of Friday, November 18th, and throughout the following week, that a continuous and changing barrage of events took place that served as the factual basis for the Employer's forming a possible belief that the Union no longer enjoyed the support of a majority of its employees. For the balance of that day and throughout the following week of November 21st, not only did a number of employees who had been either picketing or honoring the picket line return to work and express to management representatives their lack of support for the Union and, in some instances, actually resign from the Union, but a number of heretofore Union supporters announced for the first time, during that same period, that they had decided to accept permanent employment elsewhere, and accordingly, would not be considered any longer to be bargaining unit employees in the Employer's assessment of whether the Union had the support of a majority of the bargaining unit employees. See Appendix to Brief, p. App. 1 detailing the apparent change in union support status of 13 employees during that 3-or 4-day period. The change in apparent status of some 13 employees in a relatively small unit consisting of some 23 employees was not made known to the Employer until after the picket line was withdrawn on November 18th and throughout the work

week of November 21st[8]. It stands to reason that a relatively small Employer who is attempting to run its commercial enterprise would need to investigate and to assess the changed circumstances in which it found itself, as the result of the change in status of these 13 employees, and it would be an unreasonable burden to force such an Employer to prematurely announce its disavowal of its obligation to the Union, and thus incur the risk of exposure to an unfair labor practice charge. Clearly, such an Employer should have at least a few days to assess its position and, even if this Court were to disagree with the determination of the Eleventh Circuit Court of Appeals in Bickerstaff Clay Products, supra, p. 15-16, and the Seventh Circuit Court of Appeals in Chicago Tribune Co. v. NLRB, supra, p. 17-18, that an Employer who is placed in the posture of having a good faith belief of the Union's loss of majority status need not expressly withdraw any outstanding contract proposals or withdraw recognition from the Union, it certainly should have at least a reasonable period of time to assess its position and to decide the appropriateness of withdrawing outstanding contract proposals and/or withdrawing recognition from the Union. Not only should it be allowed a reasonable time to

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[8]The time which was available to the Employer to assess and analyze the sudden shift in employee support for the Union was, in fact, even more limited, as the result of the work week of November 21st being a short work week, due to the Thanksgiving holiday.

assess the information available to it and to analyze that information, it clearly has, as the Court noted in International Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 739 (1961), a statutory responsibility to carefully analyze the information available to it to assure itself whether the Union, in fact, represents a majority of its employees.

It is respectfully submitted that the Board's decision, depriving the Employer of a reasonable period of time to assess and determine the status of the Union merely upon the fact that the Union, currently having become aware of its total lack of support, sends a telegram of capitulation, that such a telegram deprives the Employer of an opportunity to react to the Union's sudden loss of majority status is so lacking in persuasive logic that it should not be enforced by this Court. Moreover, that Sunday evening telegram of capitulation, according to the Board, ensnares the employees of a company in a three-year affiliation with a Union with which the employees have affirmatively disclaimed any support.

IV.

THE JUDICIAL DEFERENCE TO NLRB INTERPRETATIONS OF THE ACT IS INAPPLICABLE WHERE THE BOARD'S STATUTORY INTERPRETATION IS UNPERSUASIVE OR RESTS ON ERRONEOUS LEGAL FOUNDATIONS, OR IS NOT SUPPORTED BY THE HISTORY OR LANGUAGE OF THE ACT.

In dealing with the traditional argument of the Board in seeking enforcement of its

Orders, that its interpretation of the Act should be granted judicial deference, this Court has determined on a number of occasions that such judicial deference is inapplicable where the Board's Order "rests on erroneous legal foundations", Lechmere v. NLRB, 502 U.S. 527, 539 (1992); NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956), and the deference to NLRB statutory interpretations is limited to circumstances in which the Board's interpretation of the Act is both "rational" and "consistent with the statute". NLRB v. Food and Commercial Workers, 484 U.S. 112, 123 (1987) Thus, whenever the Board's argument in support of its statutory interpretation is either "unpersuasive" or the Board's views are not supported by the history or language of the statute, the Court will not defer to the administrative interpretation of the statute. NLRB v. Radio and Television Broadcast Engineers, 364 U.S. 573, 581, 584 (1961) Where the Board has adopted "presumptions", this Court has noted that the judicial role is to insure that there is a sound connection between the proven facts and the inferred facts created by the presumption. NLRB v. Baptist Hospital, 442 U.S. 773, 787 (1979), quoting Republic Aviation Corp. v. NLRB, 324 U.S. 793, 804-805 (1945) and Beth Israel Hospital v. NLRB, 437 U.S. 483, 501 (1978) for the proposition that such NLRB-created "presumptions" should be upheld only if there is a rational basis, based on the proven facts, for the inferences created by those "presumptions".

In NLRB v. Brown, 380 U.S. 278 (1965), the Court set forth in detail the applicable standards for review of cases where the Court feels that the Board has acted in a manner inconsistent with the statute or which may frustrate the policies underlying that statute.

> "Courts should be "slow to overturn an administrative decision," NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112, but they are not left "to 'sheer acceptance' of the Board's conclusions," Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803. Reviewing courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Not only is such review always properly within the judicial province, but courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress. American

> Shipbuilding Corp. v. Labor Board, supra [380 U.S. 300 (1965)]"
>
> Courts must, of course, set aside Board decisions which rest on "an erroneous legal foundation. NLRB v. Babcock & Wilcox, [351 U.S. at 112-113]"
>
> 380 U.S. at 291; see also cases cited therein at footnote 5.

It is submitted that this case projects the very type of circumstances in which judicial deference to a Board's decision should be withheld. The very concept of the Board ordering an Employer to enter into an agreement with a Union which the Employer clearly and legitimately feels it had reason to believe did not represent anything close to a majority of its employees is certainly one that must be supported by either clear statutory language or by strong and persuasive policy considerations. Obviously, the statutory language does not support such a conclusion, as the congressional mandate is clear that collective bargaining relationships should only be protected when entered into with majority Unions, and the establishment of such collective bargaining relationships with minority Unions not only is expressly prohibited by Section 8(a)(2) of the Act, but is would also clearly restrict the Section 7 rights of the employees.

More specifically, the "policy" determinations which the Board claims to support its "presumption" that a Union with little

or any employee support who is astute enough to literally race to the closest telegraph office to fire off a communication to the Employer "accepting" the Employer's last offer, at a time when the Union was presumably aware of its lack of employee support, are so lacking in rational or statutory support that they should not be deferred to by this Court.

The Board's creation of a presumption of a majority status as the result of an allegedly minority Union having "accepted" the company's last offer, which "acceptance" bars consideration of the Employer's evidence that, in fact, the Union did not have majority support, flies in the face of the rationale of this Court in International Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 737 (1961), indicating that the unlawful "genesis" of such an "agreement" precludes its subsequent use to establish (or, in this case, to presume) the Union's majority status.

As noted above on pages 23 to 25, such policy considerations intended to protect collective bargainng relationships are properly limited to the protection of legitimately established and continued collective bargaining relationships and should not be stretched beyond recognition so as to apply to a Union's effort to continue that bargaining relationship by sending surprise telegrams on a Sunday evening to the home of the Employer's president, in a hasty effort to attempt to secure, for another three years, a collective bargaining agreement so as to capture within the web of that agreement employees

who had clearly and recently indicated their lack of interest in that Union. It is respectfully submitted that such an irrational basis for an even more irrational result cannot serve as a proper justification of what the Seventh Circuit noted to be a clear infringement upon the Section 7 rights of the employees. Chicago Tribune, supra, 965 F.2d at 249-250

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court reverse the Decision of the Court of Appeals for the First Circuit below, and order that this case be remanded to the National Labor Relations Board for a determination of whether, at the time of the receipt by the Employer of the Union's telegram purporting to "accept" the Employer's last offer, the Employer maintained a good faith doubt of the Union's majority support of employees within the bargaining unit.

Dated this first day of March, 1996.

Respectfully submitted,

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APPENDIX 1A

Employees who were apparent Union supporters and who advised the company on or after November 18, 1988 of their change of position to lack of support for the Union are:

1. Gary Boudreau, who picketed through the last day of picketing, November 18th, advised the company on the 18th that he was "disgusted" with the Union. He returned to work on the 21st and advised the company that he would resign from the Union that week; he confirmed with the company later that week that he had resigned from the Union. (App. 29a)

2. Rocco Aliberti came into the company after the picketing stopped on the 18th, and advised the company he was not a supporter of the Union, and would vote against the Union. (App. 17a-18a)

3. Robert Cibelli had been picketing and was one of the three remaining picketers, as of November 18th. On the 18th, he advised the company he would be returning to work the following week, and during the week of November 21st, he advised the company he had resigned from the Union, and that he was no longer a Union supporter, and was happy that the Union was no longer at the company. (App. 23a-25a)

4. David Duplisea had not worked during the strike and came in after the picket line was withdrawn. He then advised the company that he was against the Union and that he didn't feel that a Union was needed at the company and that he would vote against the Union, and that he resigned from the Union. (App. 31a-32a)

5. Quang Nguyen had honored the Union picket line, and advised the company on the 18th that he would be returning the week of November 28th, and that he intended to resign from the Union. (App. 33a-34a)

Apparent Union supporters who advised the company on November 18th that they were employed permanently elsewhere, and would not be returning to the company:

1. Union Steward Joe Parenti (App. 25a-26a)

2. Richard DeLarda (App. 19a, 47a)

3. Paul McCarthy (App. 25a-26a)

4. Ken Seaver (App. 26a, 30a-31a)

5. Michael Coyne (App. 32a)

Additionally, McCarthy advised the company on the 18th of his assessment that the Union no longer had support among most of the employees. (App. 28a)

Additionally, the Employer had been aware of various other employees previously crossing the picket line, resigning from the Union, and disavowing any support for the Union.

(App. 18a, 22a, 28a, 33a, 35a and 38a-39a)

(6)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

AUCIELLO IRON WORKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that, after a previously certified union has accepted an employer's offer for a collective bargaining agreement, the employer cannot refuse to bargain with the union and withdraw recognition from it based on a good-faith doubt about the union's majority status at the time of acceptance, when the asserted doubt is premised on events that occurred and were known to the employer before acceptance.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-668

AUCIELLO IRON WORKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 1a-8a) is reported at 60 F.3d 24. The supplemental decision and order of the National Labor Relations Board (Board) on remand (Pet. App. 9a-58a) is reported at 317 N.L.R.B. 364.

The earlier decision of the court of appeals, remanding the case to the Board (Pet. App. 59a-83a), is reported at 980 F.2d 804. The initial decision and order of the Board (Pet. App. 84a-89a) and the decision of the administrative law judge (Pet. App. 90a-120a) are reported at 303 N.L.R.B. 562.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1995. The petition for a writ of certiorari was filed on October 15, 1995, and was granted on January 19, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act (Act), 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a) of the Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *;

> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT

1. At relevant times, petitioner operated an iron fabrication shop in Hudson, Massachusetts, with approximately 23 production and maintenance employees. In 1977, the National Labor Relations Board (Board), after an election, certified Shopmen's Local No. 501, a/w International Association of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO (the Union), as the collective bargaining representative of a bargaining unit comprising those employees. Thereafter, the parties negotiated and executed successive collective bargaining agreements covering the bargaining unit. Pet. App. 10a-11a, 60a-61a, 95a; J.A. 69a-70a.

On September 21, 1988, petitioner and the Union began negotiations for an agreement to replace the one then in effect, which was to expire on September 25, 1988. Additional bargaining sessions took place on September 30, October 4, and October 13, 1988. On October 14, 1988, after the initial bargaining failed to produce an agreement, the employees in the unit went out on strike. Negotiations continued during the strike at bargaining sessions held on October 18, October 26, and November 17, 1988. Pet. App. 11a, 61a-62a, 97a-98a, 109a.

At the bargaining session on November 17, 1988, petitioner presented a complete contract proposal to the Union. Pet. App. 107a. Petitioner asserts (Pet.

Br. 3) that the proposal was less generous than prior proposals because of petitioner's belief that the Union was losing support among the employees. The Union neither accepted nor rejected the proposal on November 17, and petitioner took no action to withdraw the proposal, either on that date or thereafter. Pet. App. 11a, 61a-62a, 95a-98a, 109a.

On November 18, 1988, the picket line maintained at petitioner's plant by the striking employees was taken down. Pet. App. 11a, 36a n.47. On November 27, 1988, the Union sent petitioner a telegram stating that the Union accepted petitioner's November 17 offer. *Id.* at 63a; J.A. 65a. The telegram also stated that the strike was over and that the employees would return to work immediately. *Ibid.* However, the following day, November 28, 1988, petitioner sent the Union a telegram stating (J.A. 66a): "Employer now has reason to believe that [the Union] no longer represents a majority of the employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations."

Petitioner based its alleged belief that the Union had lost majority status on events that occurred, and of which petitioner was aware, prior to the Union's November 27 acceptance of petitioner's contract offer. See Pet. App. 72a; see also *id.* at 11a-12a; Pet. Br. 5-6. Specifically, petitioner asserted that nine of the 23 unit employees had crossed the picket line (Pet. App. 72a); as noted above, the picket line came down on November 18 (*id.* at 11a, 36a n.47). Petitioner also asserted that 13 unit employees had resigned from the Union by signing a form prepared by petitioner (*id.* at 72a; see J.A. 43a-44a); 12 of those forms were dated on or before November 21, 1988, and the remaining form was dated November 23, 1988 (J.A. 76a; see also J.A.

71a-77a). In addition, petitioner claimed that 16 unit employees had expressed dissatisfaction with the Union. Pet. App. 72a. Petitioner's vice-president testified that many of those expressions of dissatisfaction occurred on or before November 18. J.A. 42a; see also J.A. 17a-40a.

2. a. In January 1989, the Board's General Counsel issued an administrative complaint alleging that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158 (a)(1) and (5), by refusing to execute a written contract with the Union and by withdrawing recognition from it on November 28, 1988. Pet. App. 64a-65a, 91a-92a.

After a hearing, the Board, in agreement with the administrative law judge (ALJ), sustained the allegations of the complaint. Pet. App. 84a-120a. The Board (like the ALJ) refused to consider petitioner's contention that it had a good-faith doubt that the Union had majority support when it accepted petitioner's outstanding contract proposal. Relying on *Belcon, Inc.*, 257 N.L.R.B. 1341, 1346 (1981), and *North Bros. Ford, Inc.*, 220 N.L.R.B. 1021, 1022 (1975), the Board explained that, "under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a[n] [employer's] alleged good-faith doubt of the union's majority status." Pet. App. 85a n.85. The Board ordered petitioner, among other things, to enter into a written contract with the Union based on the contract proposal that the Union accepted on November 27, 1988. *Id.* at 86a, 115a, 116a.

b. The Board filed an application for enforcement of its order in the court of appeals. Pet. App. 60a. The

court held that "[t]he Board acted well within its authority in finding that [petitioner's] offer of November 17, 1988, was still on the table when the Union's negotiating committee purported to accept it by telegram on November 27, 1988." *Id.* at 70a. The court also upheld the Board's determination that the Union's negotiating committee was not required to obtain membership ratification in order to enter into a binding collective bargaining agreement. *Id.* at 70a-71a. The court declined to enforce the Board's order "at th[at] time" (*id.* at 60a, 83a), however, because the court believed that the Board had not sufficiently explained its refusal to consider petitioner's assertion of a good-faith doubt about the Union's majority status (see *id.* at 72a-82a).

3. On remand, the Board issued a lengthy supplemental decision and order. Pet. App. 9a-58a. In that decision, the Board adhered to its prior rule that, "where objective evidence to support a good-faith doubt of a union's majority status is known to the employer before a union's acceptance of the employer's contract offer but the employer does not act on that evidence prior to acceptance, the union's acceptance creates a valid collective-bargaining agreement." *Id.* at 28a. The Board recognized that, in "extraordinary circumstances," an employer's good-faith doubt about the union's majority status may "develop[] contemporaneously with a union's purported acceptance of its offer." *Id.* at 54a. The Board stated that it would evaluate "such infrequent instances" on a case-by-case basis. *Ibid.*

The Board began its analysis by discussing the presumptions that it had developed regarding a union's majority status. Pet. App. 21a-25a. The Board explained that where, as here, a union has been

certified by the Board as the exclusive bargaining representative for a unit of employees, the union ordinarily enjoys an irrebuttable presumption of majority support for the first year following its certification and during the term (for up to three years) of any collective-bargaining agreement. *Id.* at 22a-23a & n.26. The Board continued: "After the certification year (and in the absence of a collective bargaining agreement), the presumption of majority status remains, but becomes rebuttable"; an employer may rebut the presumption "by establishing either (1) that at the time of the refusal to bargain a majority of employees did not in fact support the union, or (2) that the refusal was predicated on a good-faith and reasonably grounded doubt, supported by objective considerations, of the union's majority status." *Id.* at 22a-23a. The Board observed that this Court has recognized that these presumptions "promote industrial peace," which the Court has described as the "overriding policy of the Act." *Id.* at 22a, 24a (quoting *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-38 (1987), and *Brooks* v. *NLRB*, 348 U.S. 96, 103 (1954)).

The Board next described the circumstances under which an employer may refuse to bargain with a union based on a good faith doubt about its majority status. Pet. App. 25a-28a. The Board observed that an employer may assert such a doubt "[w]ithin a reasonable time before a collective bargaining agreement expires." *Id.* at 25a. The employer may also do so "after the contract has expired * * * at any time prior to a union's acceptance of [the employer's] contract proposals." *Id.* at 25a-26a. The Board reaffirmed its rule that, after such acceptance, the employer may not assert a good-faith doubt "based on events occurring

after acceptance." *Id.* at 27a (citing *North Bros. Ford*). The Board also reaffirmed the rule applicable here: *i.e.*, that an employer may not assert a post-acceptance doubt about a union's majority status when that doubt is based on events occurring and known to the employer prior to acceptance. Pet. App. 28a (citing *Belcon* and *Chicago Tribune Co.*, 303 N.L.R.B. 682 (1991), enforcement denied, 965 F.2d 244 (7th Cir. 1992)).

The Board explained that its rule precluding consideration of post-acceptance employer assertions of doubt based on pre-acceptance events is consistent with Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5). Pet. App. 28a-31a. That provision, the Board observed, reflects that collective bargaining is "[c]entral" to achievement of the Act's "fundamental aim" of maintaining "industrial peace." *Id.* at 29a & n.35 (quoting *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981)). The Board determined (Pet. App. 29a):

> [I]t is inconsistent with the concept of good-faith bargaining for the Board to adopt a rule that an employer may continue to bargain—and thus to treat the union as the representative of a majority of its employees—by leaving its contract offer on the table to await the outcome of negotiations before deciding whether to raise a doubt of the union's majority support based on grounds that it knew existed prior to the formation of the contract.

The Board noted that in similar contexts it had refused to allow employers to avoid their bargaining obligations by manipulating the timing of their assertion of doubt about the union's majority status.

Id. at 30a-31a & nn.39-40 (citing cases). The Board reasoned that the present context provided a similar risk of manipulation: An employer that became aware of grounds for doubting the union's majority status while the employer's contract offer was outstanding could "sit" on that doubt and raise it after a contract had been formed if, in hindsight, the contract turned out to be not to the employer's liking. *Id.* at 36a; see also *id.* at 32a-37a.

The Board also explained that its rule is not inconsistent with Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), or with this Court's holding that Section 8(a)(2) prohibits an employer from recognizing a minority union even if the employer believed in good faith that the union represented a majority of the employees at the time of recognition. See *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961). The Board observed (Pet. App. 39a) (emphasis omitted):

> [*Garment Workers*] involved an employer's recognition of a nonincumbent, initially organizing actual-minority [u]nion. This case, on the other hand, involves [petitioner's] withdrawal of recognition of the incumbent, presumptively majority Union. In [*Garment Workers*], the employer's asserted good-faith belief that the union had achieved majority status at the time of recognition was no defense to its unlawful recognition; in this case, the issue is whether [petitioner's] asserted good-faith belief that the Union had lost its presumptive majority status is a validly raised defense to its withdrawal of recognition.

The Board also observed that the issue in *Garment Workers* was whether the employer's conduct violated

Section 8(a)(2) of the Act, whereas the issue in this case is whether the employer's conduct violated Section 8(a)(5). Pet. App. 38a-39a. The Board concluded that these factual and legal differences justified "different accommodations between the dual interests of furthering labor relations stability and ensuring employee freedom of choice." *Id.* at 39a.

The Board emphasized that it was making a "policy choice" in "establish[ing] a date certain—a union's acceptance of an employer's contract offer—after which an employer cannot challenge the majority status of a certified union based on an alleged good-faith doubt." Pet. App. 53a (emphasis omitted). That policy choice was based on the Board's determination that "the stability resulting from" its rule "outweighs [the rule's] potential adverse impact on employee freedom of choice." *Ibid.*

Finally, the Board determined that its rule applied here. The Board found it "clear" from testimony at the hearing that petitioner "harbored its doubt [about the Union's majority status] while its contract offer was outstanding." Pet. App. 36a. Accordingly, the Board concluded that petitioner "could not raise its alleged good-faith doubt as a defense to its withdrawal of recognition and refusal to execute the contract." *Id.* at 34a. The Board therefore found it "unnecessary to pass on whether [petitioner] presented sufficient objective evidence to support a reasonable, good-faith doubt of the Union's majority status." *Ibid.*

4. After remand, the court of appeals enforced the Board's order. Pet. App. 8a. The court held that "the Board's policy choice is reasonable and, as now articulated, quite persuasive." *Id.* at 6a. The court rejected petitioner's contention that this case comes "within the exception set forth in the Board's opinion

for cases in which a company's good faith doubt arises simultaneously with the union's acceptance of the offer." *Id.* at 6a n.2. The court "agree[d] with the Board's implicit conclusion that this case does not fall within the exception, as [petitioner] had all of the relevant information to support its claim prior to [the Union's] acceptance of the offer." *Ibid.*

SUMMARY OF ARGUMENT

I. In holding that petitioner violated Section 8(a)(1) and (5) of the Act, the Board reaffirmed its rule that, after a previously certified union has accepted an employer's offer for a collective bargaining agreement, the employer may not refuse to bargain with the union and withdraw recognition from it based on a good-faith doubt about the union's majority status at the time of acceptance, when the doubt is premised on events that occurred and were known to the employer before acceptance. Under well-established principles, the Board's rule must be upheld if it is rational and consistent with the Act. The Board's rule satisfies that standard, especially when it is viewed in the context of other decisions of the Board and this Court that address the striking of a balance between the Act's dual objectives of promoting stability in bargaining relationships while preserving the freedom of employees to select, or to refrain from selecting, a bargaining representative.

The Board's rule promotes stability in bargaining relationships primarily by preventing an employer from "sitting" on its doubt about a union's majority status during bargaining for an agreement, only to raise it if and when the agreement turns out, in hindsight, to be not to the employer's advantage. The rule thereby discourages conduct that is inconsistent

with good-faith bargaining, encourages the formation of collective bargaining agreements, and helps ensure that, after an agreement has been formed, the union can concentrate on translating that agreement into a written contract and on administering the contract. At the same time, the Board's rule leaves ample opportunity for the employer to raise a good-faith doubt about a union's majority status by other established means. Moreover, the rule leaves undisturbed the existing means by which employees may raise such doubts.

The Board's rule is consistent with the case law that construes Section 8(a)(2) of the Act to prohibit an employer from entering into a bargaining agreement with a union that lacks majority status at the time of the formation of the agreement. That case law involves unions that are shown to have actually lacked majority support when the agreement was formed. It is inapposite here, because petitioner has never alleged, and neither the Board nor the court of appeals ever determined, that the Union actually lacked majority status when it accepted petitioner's contract offer. Rather, petitioner has asserted only a good-faith doubt about the union's majority status. Nothing in the Act or the case law upon which petitioner relies makes an otherwise lawful collective bargaining agreement between an employer and a previously certified union illegal merely because, when the union accepted the agreement, the employer harbored a good-faith, but unarticulated, doubt about the union's continued majority status.

The Board's rule rationally precludes all post-acceptance assertions of good-faith doubt by an employer that are based on pre-acceptance events known to the employer. Contrary to petitioner's

contention, the Board is not required to determine the timeliness of an employer's post-acceptance assertion of doubt by considering in each case whether the employer had a reasonable opportunity to investigate the evidence on which the doubt is premised and to communicate that doubt to the union.

II. In any event, petitioner had a reasonable opportunity both to investigate the evidence on which it premised its asserted good-faith doubt about the Union's majority status and to communicate that doubt to the Union. The record establishes that petitioner had received most or all of that evidence by Monday, November 21, 1988. The Union did not accept petitioner's outstanding contract offer until Sunday, November 27, 1988. Thus, petitioner was afforded more than the "few days" it insists (Pet. Br. 31) was required to evaluate the evidence and convey its doubt.

ARGUMENT

Section 8(a)(5) of the National Labor Relations Act (Act) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representative[] of his employees." 29 U.S.C. 158(a)(5); see also 29 U.S.C. 158(a)(1) (making it an unfair labor practice for an employer to interfere with employees' exercise of rights under 29 U.S.C. 157, which includes right to bargain collectively). It is undisputed that the Union in this case was certified by the Board as the exclusive bargaining representative of a unit comprising petitioner's production and maintenance employees. See 28 U.S.C. 159(a). Petitioner nonetheless refused to bargain with the Union and withdrew recognition from the Union after it had accepted petitioner's outstanding offer for a collective

bargaining agreement, based on petitioner's purported doubt that the Union enjoyed the support of the majority of the unit employees at the time of acceptance.

The Board held that petitioner's refusal to bargain with, and withdrawal of recognition from, the Union violated Section 8(a)(1) and (5). In so holding, the Board reaffirmed its prior rule that, after a previously certified union has accepted an employer's offer for a collective bargaining agreement, the employer cannot vitiate the agreement on the basis of a good-faith doubt about the union's majority status premised on events that occurred and were known to the employer prior to acceptance. Pet. App. 53a; see *id.* at 27a (citing *North Bros. Ford, Inc.*, 220 N.L.R.B. 1021 (1975)), 37a (citing *Belcon, Inc.*, 257 N.L.R.B. 1341 (1981)), 85a n.85 (citing *Belcon* and *North Bros. Ford*). We show in Point I below that the Board's rule should be sustained. We show in Point II below that, even if the rule is not sustained, the Board reasonably refused in the circumstances of this case to consider petitioner's asserted doubt about the Union's majority status.

I. THE BOARD ACTED WITHIN ITS DISCRETION IN ADOPTING A RULE PROVIDING THAT, AFTER A PREVIOUSLY CERTIFIED UNION HAS ACCEPTED AN EMPLOYER'S OFFER FOR A COLLECTIVE BARGAINING AGREEMENT, THE EMPLOYER MAY NOT REFUSE TO BARGAIN WITH THE UNION AND WITHDRAW RECOGNITION FROM IT BASED ON A GOOD-FAITH DOUBT ABOUT THE UNION'S MAJORITY STATUS AT THE TIME OF THE ACCEPTANCE, WHEN THE DOUBT IS PREMISED ON EVENTS THAT OCCURRED AND WERE KNOWN TO THE EMPLOYER BEFORE ACCEPTANCE

A. Under Well-Established Principles Of Deference, The Board's Rule Must Be Upheld If It Is Rational and Consistent With The Act

As this Court has repeatedly stated, "[t]he function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers*, 353 U.S. 87, 96 (1957); accord *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (Board has "primary responsibility for developing and applying national labor policy"); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978); *American Broadcasting Cos.* v. *Writers Guild of America, West, Inc.*, 437 U.S. 411, 431 (1978); *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 350 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Accordingly, the Court gives "considerable deference" to the Board's interpretation of the Act, and

will uphold that interpretation if it is "rational and consistent with the Act," even if the Members of this Court "would have formulated a different rule had [they] sat on the Board." *Curtin Matheson*, 494 U.S. at 787; *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. at 350; see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Deference is particularly appropriate when the Board's interpretation is informed by considerations of labor policy. "It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy," and if the Board is to accomplish that task it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp.*, 437 U.S. at 500-501. Thus, when a Board rule is the result of the Board's exercising the "'difficult and delicate responsibility' of reconciling conflicting interests of labor and management," the rule "is 'subject to limited judicial review.'" *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *Truck Drivers*, 353 U.S. at 96. See also *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450, 453 (1995); *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994).

These principles of deference apply to the Board rule at issue here. The Board decided "as a policy matter" that "the stability resulting from" that rule "outweighs the potential adverse impact on employee freedom of choice." Pet. App. 53a. That policy judgment, moreover, was based in significant part on the Board's assessment of the realities of labor-management relations. In particular, the Board de-

termined that, in the absence of its rule, an employer who develops doubts about a union's majority status while the employer's contract offer is outstanding could keep those doubts to itself until after its offer is accepted and a contract had been formed, and raise them if and when the employer determines, in hindsight, that the contract was not to its benefit. Because the Board's decision was based on policy considerations and factual assessments that Congress entrusted primarily to the Board, its decision is entitled to considerable deference.

B. The Board's Rule Is Properly Viewed In The Context Of Other Board Rules And Decisions Of This Court That Involve Accommodation of the Act's Policies of Promoting Stability In Bargaining Relationships While Preserving Employee Freedom To Select, Or Refrain From Selecting, Bargaining Representatives

The rule applied by the Board in this case can properly be reviewed only in the context of the legal framework within which it developed. That framework includes the Board's presumptions regarding a union's majority status. It also includes other Board rules, as well as decisions of this Court, that, like the rule applied here, recognize the "dual objectives" of the Act "to further industrial peace and labor relations stability by encouraging the practice and procedure of collective bargaining while preserving for employees the right to choose, or to refrain from choosing, a bargaining representative." Pet. App. 21a & n.20 (citing 29 U.S.C. 151), 22a.

The presumptions regarding majority status have been described in prior decisions of this Court. "First, after a union has been certified by the Board

as a bargaining-unit representative, it usually is entitled to a conclusive presumption of majority status for one year following the certification." *Fall River*, 482 U.S. at 37; see also *Curtin Matheson*, 494 U.S. at 777-778; *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 & n.3 (1972); *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954). A union is entitled to the same conclusive presumption of majority status during the term (for up to three years) of any collective-bargaining agreement. See *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. at 343 n.8 ; *Burns*, 406 U.S. at 290 n.12; see also *General Cable Corp.*, 139 N.L.R.B. 1123 (1962).[1] After the certification year or the collective-bargaining agreement expires, the presumption of majority status continues, but becomes rebuttable. See *Curtin Matheson*, 494 U.S. at 778; *Fall River*, 482 U.S. at 38; *Burns*, 406 U.S. at 279 n.3, 290 n.12 (1972); *Brooks*, 348 U.S. at 99; see also Pet. App. 22a-23a. "Under the Board's longstanding approach, an employer may rebut that presumption," and thereby justify a refusal to bargain with the union, "by showing that, at the time of the refusal to bargain, either (1) the union did not *in fact* enjoy majority support, or (2) the employer had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, 494 U.S. at 778; see also *Station KKHI*, 284 N.L.R.B. 1339, 1340 (1987), enforced, 891

[1] A union's "conclusive" presumption of majority status may be overcome only in "unusual circumstances," such as where the certified union dissolves or becomes defunct, or where substantially all the members and officers of the certified union transfer their affiliation to a new local or international as the result of a schism. See *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954). None of those circumstances is present.

F.2d 230 (9th Cir. 1989); *Celanese Corp.*, 95 N.L.R.B. 664, 672 (1951).[2]

As this Court has explained, these presumptions "are based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision." *Fall River*, 482 U.S. at 38. Specifically, the presumptions further the Act's "overriding policy" of "industrial peace" by "promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees." *Ibid.* (internal quotation marks and citations omitted). They promote stability in two ways. First, "they enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified." *Ibid.*[3] Second, they "remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Ibid.*[4] "The upshot of the presumptions is to permit

[2] To demonstrate an actual lack of majority support, the employer must make a "numerical showing" that the unit employees do not wish to be represented by the union; by contrast, to demonstrate a good-faith doubt about the union's majority status, the employer may rely on circumstantial evidence. *Curtin Matheson*, 494 U.S. at 788 n.8.

[3] See also *Brooks*, 348 U.S. at 100 (Board's presumptions reflect judgment that "[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out").

[4] See also *Brooks*, 348 U.S. at 100 ("It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies * * *, union strength may erode and thereby relieve him of his statutory duties at any time, while if he

unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace." *Id.* at 38-39.

This Court has rejected the notion that, by limiting the ability of *employers* to challenge a union's majority status, the presumptions impermissibly limit the right of *employees* to select, or refrain from selecting, a bargaining representative. See *Fall River*, 482 U.S. at 38 (presumptions operate "without impairing the free choice of employees"). For example, in *Brooks* v. *NLRB*, an employer received a petition signed by nine of the 13 employees in the bargaining unit stating that they did not wish to be represented by the union that had been selected by a majority of the employees in that same unit in a Board-supervised election held one week earlier. 348 U.S. at 97. This Court sustained the Board's determination that the employer had violated Section 8(a)(5) by subsequently refusing to bargain with the union. 348 U.S. at 103-104. The Court rejected the employer's contention that, "whenever an employer is presented with evidence that his employees have deserted their certified union, he may forthwith refuse to bargain." *Id.* at 103. The Court concluded that "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace], it is inimical to it." *Ibid.*[5]

works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.").

[5] Decisions of this Court after *Brooks* also recognize the validity of the Board's presumptions regarding a union's majority status. In *Burns*, the Court held that a successor employer had to bargain with the union certified to represent the employees of its predecessor. 406 U.S. at 277-281. In so holding, the Court determined that the successorship was "not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period." *Id.* at 279; see also *id.* at 279 n.3, 290 & n.12. Similarly, the Court in *Fall River* "comment[ed] approvingly" on the presumptions, as the Board observed in the present case (Pet. App. 24a), in upholding a decision by the Board concerning the bargaining obligations of a successor employer. In *Curtin Matheson*, the Court held that, in determining whether an employer had demonstrated a good-faith doubt about a union's majority status, the Board reasonably refused to presume that striker replacements opposed the union. 494 U.S. at 786-796. See also *Iron Workers*, 434 U.S. at 343 n.8 (citing with apparent approval conclusive presumption of majority status that obtains during term of collective bargaining agreement).

In other contexts, the Court has similarly recognized that the Act's policy of promoting stability in bargaining relationships may justify limits on challenges to a union's majority status. In *Local Lodge No. 1424, Int'l Ass'n of Machinists* v. *NLRB*, 362 U.S. 411 (1960), the Court held that the Act's six-month statute of limitations barred an unfair labor practice charge based on an employer's execution of a collective bargaining agreement with a union that actually lacked majority support at the time of execution. *Id.* at 412, 416-429. The Court rejected the continuing-violation theory on which the Board rested its claim of timeliness. The lower court had accepted that theory on the ground that the Board reasonably could have concluded that "the interests of [employee] self determination outweighed otherwise important competing considerations of burying stale disputes." *Id.* at 428. In reversing the lower court, this Court determined that "the accommodation between these

competing factors has already been made by Congress." *Ibid.* (brackets supplied by Court). The Court explained (*ibid.* (internal quotation marks omitted)):

> It may be asserted, without fear of contradiction, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in industrial peace which it is the overall purpose of the Act to secure.

The Court has also recognized that, when Congress has not specifically struck the balance between promoting stability in bargaining relationships and employee self-determination, the Board has broad discretion to do so. Cf. *Beth Israel*, 437 U.S. at 504 ("it is the Board upon whom the duty falls in the first instance to determine the relative weight of the conflicting interests and to balance their weight"). In *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944), the Court held that the Board may order an employer that has committed an unfair labor practice to bargain with a union that had lost its majority status as a result of the unfair labor practice. The Court rejected the employer's contention that the order produced "injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement." *Id.* at 705. The Court pointed out that the order was "not intended to fix a permanent bargaining relationship"; rather, it was intended to reflect that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Ibid.*

The Board carefully examined the foregoing precedent in the present case. See Pet. App. 21a-25a, 30a-31a, 46a-53a. As the Board recognized (see *id.* at 20a-21a), this case involves the operation of the Board's presumptions in a particular setting: The question is whether, at a time when a previously certified union ordinarily would enjoy a conclusive presumption of majority status because of its prior acceptance of the employer's contract offer, an employer may assert a good-faith doubt about the union's majority status, when that doubt is based on events that occurred, and were known to the employer, at a time when the union enjoyed only a rebuttable presumption of majority status (*i.e.*, prior to acceptance). To resolve the applicability of the presumptions in that setting, the Board properly considered the manner in which the presumptions "promot[e] stability in collective-bargaining relationships without impairing the free choice of employees." *Id.* at 22a. The Board also properly took into account precedent that, though not directly involving the presumptions, did involve "accommodations of the dual interests in employee free choice and stable bargaining relations." *Id.* at 46a.[6]

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[6] Contrary to petitioner's assertion (Pet. Br. 15-17, 19-21), neither this Court's decision in *Curtin Matheson*, nor that of the Eleventh Circuit in *NLRB* v. *Bickerstaff Clay Products Co.*, 871 F.2d 980 (1989), foreclosed the rule adopted by the Board in this case. Although the employer in each of those cases raised its assertion of a good-faith doubt after the union's acceptance of the employer's contract offer, in neither case did the parties litigate the timeliness of the employer's assertion of a good-faith doubt. Instead, the parties framed the issue as whether the employer had demonstrated a good-faith doubt, and, in particular, whether the employer could rely on a

C. The Board's Rule Is Rational And Consistent With The Act

1. *The Board's rule discourages employer conduct that is inconsistent with good-faith bargaining, and it effectuates the Act's policies of encouraging the formation of collective bargaining agreements and providing stability in established bargaining relationships.*

a. The Board's rule reasonably requires an employer who develops a good-faith doubt about the union's majority status in the course of negotiations to voice his doubt at that point, while the union's presumption of majority support is rebuttable. When the employer does so, the employer may continue to bargain and file a representation petition with the board to determine the union's majority status. Alternatively, the employer may break off negotiations; if it does so, the employer's demonstration of a good-faith doubt about the union's majority status provides a defense to the charge that the employer's refusal to bargain with the union constituted an unfair labor practice.

The conclusion of an agreement between the union and the employer is properly regarded as an event that significantly alters the relationship between the parties. It is reasonable to require the employer, after that point, to hold its peace with regard to doubts it may have entertained prior to the agreement's formation. Once an agreement is concluded, the time for bargaining and for the often disruptive tactics that attend it is over. Each side must accept the result of the bargaining process and get on with

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presumption that striker replacements did not support the union. See Pet. App. 55a-56a.

the business of reducing the agreement to writing and administering the resulting written agreement.

The significance properly accorded to the point at which an agreement is formed between an employer and a union would be drastically diminished if the employer could, during the term of the agreement, attempt to prove that it harbored doubts about the union's majority status at the time the agreement was formed. As long as the employer has that opportunity, the agreement remains conditional in a sense. Both parties know that everything done under the agreement could be undone. That awareness can only undermine the stability of the bargaining relationship.

The extent to which the Board's rule fosters stability in bargaining relationships is especially clear when it is recognized that proof of a good-faith doubt about a union's majority status differs significantly from proof of an actual loss of majority status. Here, for example, petitioner sought to rely on evidence that a number of employees crossed the picket line. Pet. App. 72a. Even if we assume that such evidence is relevant to the existence of a good-faith doubt, it has little if any probative value in establishing an actual loss of majority status. An employee's decision to cross the picket line is ambiguous, standing alone. It may indicate the employee's financial situation rather than a desire not to be represented by the union. Moreover, the significance of the employee's decision can become more difficult to assess with the passage of time. For example, when a company relies on an employee's decision to cross the picket line months after that conduct occurred, the employee may have left the company's employment or may view differently in retrospect the

motive for that decision. The Board's rule properly prevents an employer from relying on such conduct to vitiate an agreement that is already in place.[7]

b. Thus, the Board's rule promotes stability in bargaining relationships in several ways.

1. The Board's rule, like the presumptions underlying it, discourages employer conduct that is inconsistent with good-faith bargaining. See *Fall River*, 482 U.S. at 38; *Brooks*, 348 U.S. at 100. As the Board explained, if an employer were permitted to "sit" on its doubt about the union's majority status until after the union had accepted the employer's contract offer, it could "unilaterally" vitiate, at any time during its term (within the statutory limitation period), an agreement that in hindsight proved to be not to the employer's liking. Pet. App. 36a. Such conduct is at odds with the statutory obligation to bargain in good faith. See *id.* at 29a. It is rational for the Board to adopt a rule that removes any incentive the employer may otherwise have to engage in such improper bargaining tactics. That rule, moreover, is firmly grounded on the Board's experience that some employers actually do engage in such tactics.[8]

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[7] The Board has not taken and does not take a position on whether it would entertain an employer's claim, after a union's acceptance of a bargaining agreement, that the union actually lacked majority support when the agreement was formed, where the employer based that claim on events that occurred and were known to the employer prior to the formation of the agreement. As explained in the text, the substantiation required to support such a claim would ordinarily differ from that required to support a claim of good-faith doubt by the employer.

[8] See Pet. App. 31a nn.39-40 (citing *Bennett Packaging Co.*, 285 N.L.R.B. 602, 608 (1987) (employer's alleged doubt about union's majority status was not held in "good faith" when it "was not raised until * * * full agreement on the collective-bargaining agreement had been reached, though the claim was based on information known to [the employer] all through the bargaining process"); *King Radio Corp.*, 208 N.L.R.B. 578, 584 (1974) (employer's assertion of good-faith doubt about union's majority status was "obvious[ly]" made merely as "an afterthought" in response to union's filing of unfair labor practice charges, in light of, *inter alia*, the fact that during extended period of close negotiations, employer "had never made a claim to the Union that it doubted its majority status even though the factors upon which it relied to establish the alleged doubt * * * were well known to the [employer] during all critical times"), enforced, 510 F.2d 1154 (10th Cir.), cert. denied, 423 U.S. 839 (1975); *Bolton-Emerson, Inc.*, 293 N.L.R.B. 1124, 1129 (1989) (finding unlawful the "bargaining ploy" of "[n]egotiating only so long as negotiations appear to produce desired results and then breaking them off when they fail to do so" on the basis of an alleged good-faith doubt harbored by employer during the negotiations), enforced, 899 F.2d 104 (1st Cir. 1990)).

The Board's rule also effectuates the Act's policy of encouraging the formation of collective bargaining agreements. See 29 U.S.C. 151. Under the Act, "an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn." *Pepsi-Cola Bottling Co.* v. *NLRB*, 659 F.2d 87, 90 (8th Cir. 1981); accord *NLRB* v. *Burkart Foam, Inc.*, 848 F.2d 825, 830 (7th Cir. 1988). Thus, a strike, a counter-proposal, or a rejection of the employer's outstanding offer does not terminate the offer, for such limitations would "run[] counter to federal labor policy which encourages the formation of collective bargaining agreements." *Pepsi-Cola Bottling*, 659 F.2d at 89. The Board's rule prevents nullification of

that policy by insuring that, when a contract offer has been accepted, the resulting contract cannot be abrogated in the absence of a showing of a true change in circumstances, and not merely on the basis of a good-faith doubt about the union's majority status that antedated acceptance of the contract offer. See Pet. App. 33a ("if an employer fails to raise a doubt based on known preacceptance factors until after acceptance, the Board will not view those factors as 'changed circumstances' vitiating the employer's offer or the contract's validity"); see also note 1, *supra* (describing changes in circumstances sufficient to overcome otherwise conclusive presumption of majority status).

ii. Also like the presumptions underlying it, the Board's rule promotes stability in established bargaining relationships. By precluding an employer's post-acceptance assertion of a good-faith doubt about the union's majority status at the time of acceptance, the rule allows the union during the post-acceptance period to focus on obtaining and administering a collective bargaining agreement and on developing a bargaining relationship with the employer. See *Fall River*, 482 U.S. at 38.

The Court in *Fall River* recognized that the union in that case needed the period of repose afforded by the presumption during the "unsettling transition period" between a predecessor employer and its successor "to safeguard its members' rights and to develop a relationship with the successor." 482 U.S. at 39. Similar policy considerations apply where, as here, the union may have abandoned an unsuccessful strike in the belief that it could still obtain a contract, albeit on the employer's terms. See Pet. App. 62a-63a; cf. *Belcon, Inc.*, 257 N.L.R.B. 1341, 1344 & n.8 (1981).

No less than in a successorship situation, the union in the aftermath of an unsuccessful strike faces an "unsettling transition period," since its capitulation to the employer's superior economic strength may have weakened its relationship with the employees. In that situation, it is reasonable to afford the union a period of repose, during which it may demonstrate to the employees that, while the contract may not be as favorable as they might have wished, the union will diligently administer its terms on behalf of the employees, starting with issues that are likely to arise respecting the reinstatement of striking employees. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967) (economic strikers who unconditionally offer to return to work must be reinstated "[i]f and when a job for which the striker is qualified becomes available").[9]

iii. Finally, the Board's rule is informed by its experience that, as a practical matter, the employer's objective actions during negotiations are a more reliable indicator of whether reasons existed for doubting the union's majority status at the time of contract acceptance than are the employer's post-acceptance assertions of such doubt. As the Board

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[9] Petitioner contends that the Board's rule is inconsistent with the presumptions because the presumptions are designed to promote only "lawfully established" bargaining relationships. Pet. Br. 21. Petitioner then argues that a bargaining relationship is not "lawfully established" if it is based on an agreement between an employer and a union that actually lacked majority status at the time the agreement was formed. *Id.* at 24-26. Whatever the merits of that argument, it is inapplicable here. As discussed *infra* (pp. 34-36), petitioner has never asserted that the Union actually lacked majority support at the time of its acceptance of petitioner's contract offer, but has instead asserted only a good-faith doubt about its majority status.

observed, an employer that "continue[s] to bargain * * * by leaving its contract offer on the table" has, by its own conduct, signalled a determination "to treat the union as the representative of a majority of its employees." Pet. App. 29a. Moreover, the Board reasonably determined that the demonstration of a good-faith doubt after acceptance "becomes amenable to post-hoc reasoning and self-serving interpretations." *Id.* at 36a-37a. The Board's rule obviates such problems of proof and the disruptive post-acceptance litigation in which they arise.

2. *The Board's rule reasonably accommodates the legitimate interests of employers and employees.*

a. The Board's rule preserves the employer's prerogative under the Act to withdraw recognition from a union based on a good-faith doubt about its majority status. As the Board explained, an employer has control over "whether or when its doubt will be asserted." Pet. App. 32a. The Board's rule merely requires that, as was true of petitioner, "if an employer is aware of objective evidence to support a good-faith doubt *before* the union accepts its offer, it must, for the defense to be timely raised, act on this doubt before the union accepts its offer." *Id.* at 33a. When the employer does so, its assertion of a good-faith doubt is a "changed circumstance" that vitiates the outstanding offer. *Ibid.* Given the employer's ability to void an outstanding contract offer in this fashion, there is no justification for permitting it to wait until acceptance of its offer before raising a pre-existing doubt as to the union's majority status.

Moreover, the Board's rule does not curtail other rights possessed by the employer under the Act. For

example, an employer that develops a good-faith doubt about the incumbent union's majority status after the expiration of an existing agreement may petition the Board for an election. See *Fall River*, 482 U.S. at 41 n.8; *NLRB* v. *Financial Institution Employees of America*, 475 U.S. 192, 198 (1986); *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 568 (1950); 29 U.S.C. 9(c)(1)(B); 29 C.F.R. 102.60(a); see also *Brooks*, 348 U.S. at 104 n.18. Upon the filing of such a petition, the Board will hold an election, if the employer "demonstrate[s] by objective considerations that it has some reasonable ground for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 N.L.R.B. 652, 656 (1966); *United States Gypsum Co.*, 161 N.L.R.B. 601 (1966).[10]

The employer may protect its legitimate interests even if it is uncertain whether it has enough objective evidence to support a good-faith doubt about the union's majority status during negotiations. In lieu of petitioning for an election, the employer may withdraw an outstanding offer at any time before the union's acceptance for any lawful reason. *Burkart Foam*, *supra*; *Pepsi-Cola Bottling*, *supra*; see, *e.g.*, *J.*

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[10] Under the Board's "blocking charge" rule, the filing of an unfair labor practice charge alleging an unlawful withdrawal of recognition will ordinarily halt the processing of an election petition. NLRB Casehandling Manual (Part Two) § 11730.3 (Sept. 1989); *NLRB* v. *Big Three Industries, Inc.*, 497 F.2d 43, 51-52 (5th Cir. 1974). As a general matter, however, the employer may avoid the operation of the blocking charge rule by not withdrawing recognition from the union (or committing other unfair labor practices that would preclude a fair election, were one held). In this case, the Board's blocking charge rule would not have applied, because no unfair labor practice charge was filed before the Union accepted petitioner's contract offer and petitioner withdrew recognition from the Union.

Hofert Co., 269 N.L.R.B. 520, 520-521 (1984) (Board found offer withdrawn when not accepted by date specified in offer). Indeed, where, as here, the employer has gained the upper hand in an economic strike, it may, consistent with its bargaining obligations under Section 8(a)(5), withdraw its outstanding contract proposal and make a less generous offer, for "[i]t is not illegal for an employer who has weathered a strike to capitalize upon its new found strength to secure contract terms it desires." *Hickinbotham Bros. Ltd.*, 254 N.L.R.B. 96, 102 (1981); see also, *e.g.*, *Plymouth Stamping Div., Eltec Corp.*, 286 N.L.R.B. 890, 896 (1987), enforced, 870 F.2d 1112 (6th Cir.), cert. denied, 493 U.S. 891 (1989). Petitioner apparently (see Pet. Br. 3) availed itself of that opportunity by making a less generous contract offer on November 17, 1988, but then, notwithstanding an alleged further erosion in the Union's employee support, it elected to leave that offer on the bargaining table so that it could be accepted by the Union on November 27.

b. The Board's rule respects the right of employees "to bargain collectively through representatives of their own choosing" and to refrain from doing so. 29 U.S.C. 157. It gives employees a period of stability during which a union presumptively supported by the majority of the employees has an opportunity to obtain and administer a collective bargaining agreement on their behalf.

Moreover, as the Board emphasized, its rule limits the ability only of *employers* to assert a doubt about the union's majority status. Pet. App. 53a. The Board's rule leaves employees entirely free to pursue their right under the Act to remove or replace their bargaining representative. Under the Act, employees "are not powerless to reject a union that they believe

no longer commands their support." *Fall River*, 482 U.S. at 50 n.16. They may file a decertification petition with the Board during the "window period" 60 to 90 days prior to the expiration of an existing agreement of three years' duration or less. Pet. App. 23a n.26; *Crompton Co.*, 260 N.L.R.B. 417, 418 (1982). In addition, they may file a decertification petition at any time after the existing contract has expired and before the union accepts an outstanding offer by the employer for a new contract. If the decertification petition is supported by a 30% showing of interest among the unit employees, it will ordinarily trigger a Board election. See 29 U.S.C. 159(c)(1)(A)(ii); 29 C.F.R. 101.18(a); *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958).

In this case, the then-current labor agreement between petitioner and the Union expired on September 25, 1988 (Pet. App. 95a); thus, the employees were free to file a decertification petition, pre-expiration, during the period 60 to 90 days prior to September 25, 1988, and, again, during the roughly two-month period from the expiration of the contract (September 25, 1988) until the Union accepted petitioner's contract offer (November 27, 1988). The employees did not do so, however, even though they were aware of their decertification rights.[11] Particularly in those cir-

[11] The record indicates that, in late August or early September 1988, employees Dick Boudreau and John Duckworth asked Gerald Sauer, petitioner's controller, "what they needed to do to get rid of the union." J.A. 60a. Sauer referred the employees to the Board. *Ibid.* Boudreau later told Sauer that he had "called up the NLRB and got the paperwork on it." J.A. 61a. However, no decertification petition was filed; and Boudreau himself joined the strike and the picketing. J.A. 51a-53a. Had the employees filed a decertification petition, the

cumstances, "[t]o allow [petitioner] to rely on [its] employees' rights in refusing to bargain with the [Union] is not conducive to [industrial peace], it is inimical to it." *Brooks*, 348 U.S. at 103.

D. The Board's Rule Is Not Inconsistent With Section 8(a)(2) of the Act Or Case Law Construing That Provision

Petitioner's principal contention is that the Board's rule violates Section 8(a)(2) of the Act, as construed in *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961), and in certain lower-court decisions. See Pet. Br. 21-26, 28-29, 35-36. Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." In *Garment Workers*, this Court held that an employer had violated Section 8(a)(2) by entering into a recognition agreement with an initially-organizing union that actually lacked majority support at the time of the agreement. 366 U.S. at 733-734, 737-738. Petitioner's reliance on Section 8(a)(2) and case law construing it is unpersuasive.

1. Unlike *Garment Workers*, this case involves a claim of a good-faith doubt about a union's majority status, rather than a claim that the union actually lost majority status. The Board repeatedly "emphasized that the case before us does not involve allegations of an actual loss of majority status." Pet. App. 54a n.76; see *id.* at 17a n.16, 20a n.19; see also *id.*

Board's "blocking charge" rule would not have barred Board consideration of that petition, just as the rule would not have barred Board consideration of any petition for an election filed by petitioner. See note 10, *supra*.

at 39a. The Board also emphasized that its decision "does not affect the principle that a union and an employer are not permitted to continue bargaining if the union has actually lost its majority s[t]atus and the employer and the union are aware of this actual loss." *Id.* at 54a; see also *id.* at 38a-39a.[12]

The Board and the courts have recognized the distinction between claims of good-faith doubt and claims of actual loss of majority support.[13] The question presented here is limited to whether the former claim may be asserted by an employer, after the union's acceptance of the employer's contract offer, based on events occurring and known to the employer prior to acceptance.

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[12] Although petitioner repeatedly asserts or implies in this Court that the Union had actually lost majority support at the time that it accepted petitioner's contract offer (see Pet. Br. 13, 18, 21, 23-24, 26-27, 35, 36), it never advanced that claim before the Board. Its failure to do so precludes consideration of that claim by this Court. Section 10(e) of the Act, 29 U.S.C. 160(e), provides in pertinent part that "[n]o objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (holding that under 29 U.S.C. 160(e) the court of appeals "was without jurisdiction to consider" an issue "not raised during the proceedings before the Board"). Petitioner does not contend that such circumstances exist here.

[13] See, *e.g.*, *Curtin Matheson*, 494 U.S. at 778, 788 n.8; *Whisper Soft Mills, Inc.* v. *NLRB*, 754 F.2d 1381, 1387 (9th Cir. 1984); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *NLRB* v. *Windham Comm. Memorial Hospital*, 577 F.2d 805, 811 (2d Cir. 1978); *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 489 (2d Cir. 1975); *Station KKHI*, 284 N.L.R.B. 1339, 1340 (1987), enforced, 891 F.2d 230 (9th Cir. 1989); *Celanese Corp.* 95 N.L.R.B. at 672.

In any event, there is no inconsistency between the Board's rule in this case and the Court's decision in *Garment Workers*. As the Board explained, "the violation found [in *Garment Workers*] was the employer's initial grant of exclusive representation status to a union that had not been chosen by a majority of its employees." Pet. App. 40a. Here, by contrast, the Union "was the certified representative of [petitioner's] unit employees"; it "was operating under a rebuttable presumption of continued majority support" that "was unchallenged at the time of acceptance" of petitioner's contract offer; and, at that time, "there was no legally cognizable evidence that continued bargaining would involve dealing with a minority union." *Id.* at 40a-41a. Nothing in the Act makes an otherwise lawful labor contract illegal simply because the employer may have harbored a good-faith doubt (that remained unarticulated during the negotiations) about the majority status of the union with which it negotiated that agreement.

2. Similarly misplaced is petitioner's reliance on the Seventh Circuit's decision in *Chicago Tribune Co.* v. *NLRB*, 965 F.2d 244 (1992). Pet. Br. 17-19, 37. There, the court held that, after a union had accepted the employer's contract offer, the employer could assert that the union lacked majority support at the time of acceptance. 965 F.2d at 250. In so holding, the court relied on *Garment Workers* and *Fall River*, 482 U.S. at 51 n.18, for the proposition that "the law forbids a company to sign a collective bargaining contract with a union that it knows does not have the support of a majority of the workers in the bargaining unit." *Chicago Tribune*, 965 F.2d at 249-250 (citation omitted).

Neither that proposition nor the holding in *Chicago Tribune* is applicable here: Petitioner did not know that the Union had lost majority support when it refused to acknowledge the Union's acceptance of its offer; rather, petitioner had, at most, a good-faith doubt about the Union's majority status. Indeed, before the Board and the court of appeals, petitioner never asserted—and neither the Board nor the court found—that the Union in fact lacked majority support at the time of acceptance. See note 12, *supra*. In contrast, the Seventh Circuit in *Chicago Tribune* understood the employer to have based its refusal to sign an agreement with the union on its knowledge that the union had in fact lost majority support at the time of acceptance (965 F.2d at 248); moreover, the court determined that such a loss of majority support had in fact occurred (*id.* at 250). Thus, the Seventh Circuit held that the Board's rule—"that a union's unconditional acceptance of an offer for a collective bargaining contract is valid and binds the company unless circumstances have changed since the company's offer was made or renewed"—does not "apply to a case such as this where between the original offer and its renewal the union lost the support of the workers." *Ibid.* That holding does not govern the resolution of the present case, in which there was neither an assertion by the employer nor a finding by the Board or the court of appeals that the union had actually lost the support of a majority of the workers at the time it accepted the employer's contract offer.

For precisely the same reason, *Garment Workers*, one of the decisions on which *Chicago Tribune* relied, is inapposite here—since *Garment Workers* also involved a union that actually lacked majority support

at the time the contract was formed. In *Fall River* (on which *Chicago Tribune* also relied), the Court suggested that a successor employer might violate Section 8(a)(2) if it recognized the incumbent union before a "substantial and representative complement" of employees had been hired. 482 U.S. at 51 n.18. The basic teaching of *Fall River*, however, is that, once the successor has hired a representative complement of employees, and a majority of that complement consists of employees who worked for the predecessor, the union's rebuttable presumption of majority status continues into the new relationship. *Id.* at 46-52. *A fortiori*, where no successorship was involved, the Union enjoyed a rebuttable presumption of majority support at the time the Union accepted petitioner's contract offer.

3. Petitioner's reliance (Pet. Br. 24-26) on *Royal Coach Lines, Inc.* v. *NLRB*, 838 F.2d 47 (2d Cir. 1988), and *Moisi & Sons Trucking, Inc.*, 197 N.L.R.B. 198 (1972), is also unavailing. Those cases hold that an employer that has voluntarily extended initial recognition to the union may subsequently withdraw recognition from the union if the employer "introduces affirmative evidence *proving a lack of majority status* at the time of the recognition agreement." *Moisi & Sons Trucking*, 197 N.L.R.B. at 198 n.2 (rejecting the defense; emphasis added); *Royal Coach Lines*, 838 F.2d at 55 (finding that union did not in fact have majority status when it obtained voluntary recognition). Neither decision addresses the very different situation presented here, where, after acceptance of a contract by a previously certified, incumbent union which enjoyed a rebuttable presumption of majority status at the time of acceptance, the employer withdraws recognition from the union, based

only upon a pre-existing good-faith doubt as to the union's majority status at the time of acceptance.[14]

E. The Board Rationally Adopted a Bright-Line Rule That Precludes All Post-Acceptance Employer Assertions of Good-Faith Doubt About a Union's Majority Status

The Board acted reasonably in "establish[ing] a date certain—a union's acceptance of an employer's contract offer—after which an employer cannot challenge the majority status of a certified union based on an al[l]eged good-faith doubt." Pet. App. 53a (emphasis omitted). Petitioner contends, however, that an employer should have a "reasonable opportunity * * * to investigate and verify the information, which, if confirmed, would serve as the basis for the Employer's good faith doubt," as well as "a reasonable period of time to communicate its good faith doubt to the Union." Pet. Br. 27. Contrary to petitioner's contention, the Board was not obligated to adopt a rule requiring a case-by-case determination of whether an employer had such opportunities.

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[14] Petitioner incorrectly suggests (Br. 14 n.4) that the Board's rule is inconsistent with its decision in *Viking Lithographers, Inc.*, 184 N.L.R.B. 139 (1970). There, the Board found that the employer acted lawfully in withdrawing recognition from the union based on a good-faith doubt about the union's majority status. *Id.* at 140. As the Board noted (Pet. App. 26a n.31), however, the parties in *Viking Lithographers*, unlike those here, had not reached a binding agreement when the employer withdrew recognition. See 184 N.L.R.B. at 139-140. Because the claim of a good-faith doubt in *Viking Lithographers* was not made after the formation of an agreement, it was not made at a time when the presumption of majority status was conclusive.

The Board's bright-line rule, based on the date of acceptance, exemplifies the way in which previously recognized presumptions regarding a union's majority status operate. They attach upon the occurrence of objective, readily ascertainable events. Thus, in *Brooks*, the presumption barred an employer from relying on clear-cut proof of a union's actual loss of majority status that arose only one week after an election. See 348 U.S. at 97. In this case, the applicable presumption arose upon the Union's acceptance of petitioner's contract offer. At that point, an agreement was formed that the Union had a right to have embodied in a written collective bargaining agreement. See *H.J. Heinz Co.* v. *NLRB*, 311 U.S. 514, 523-526 (1941). It is entirely logical that the Board's rule applies at the same point.

More fundamentally, the Board's selection of the acceptance date accords with the purposes of the presumptions. Immediately after acceptance, the union needs the benefit of the presumption in order to focus upon obtaining a written contract incorporating the terms of the agreement. At the same time, the risk arises that the employer may assert a good-faith doubt in order to avoid having to sign such a contract. Of course, the contract proposal that the union has accepted must have been sufficiently complete so that its acceptance creates an enforceable contract. See Pet. App. 107a ("There is no dispute that [petitioner's] extensive oral and written proposals of November 17 effectively comprised a complete contract."). But even a proposal that sets forth all of the essential elements of an agreement usually leaves many details to be worked out. In the process of resolving those details, an employer may well develop misgivings about the agreement. Thus, the Board's rule is

rationally triggered as soon as the need for the presumption of majority status arises.

The Board "recognize[d] that extraordinary circumstances may arise in which a union's acceptance of an employer's final contract offer and the employer's assertion of a good-faith doubt are simultaneous." Pet. App. 54a. The Board indicated that it would address any cases presenting such circumstances on a case-by-case basis. *Ibid.* As the court of appeals observed, however, the Board implicitly determined that this is not such a case. *Id.* at 6a n.2. The court of appeals specifically (*ibid.*) sustained that determination, as well as the Board's related (explicit) finding that the evidence in support of petitioner's alleged good-faith doubt "[was] in existence and known to the employer before acceptance" (*id.* at 20a). Petitioner does not, and cannot, challenge that finding here, see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In those circumstances, petitioner provides no basis for setting aside the Board's rule when it suggests (Pet. Br. 27; see also *id.* at 28) that the Board's rule could preclude an employer from asserting a good-faith doubt about a union's majority status if the Union accepts the employer's contract offer "within minutes or hours" of the employer's receipt of the information that gives rise to the doubt.

II. IN ANY EVENT, IN THE CIRCUMSTANCES OF THIS CASE THE BOARD REASONABLY REFUSED TO CONSIDER PETITIONER'S ASSERTION OF A GOOD-FAITH DOUBT ABOUT THE UNION'S MAJORITY STATUS

If petitioner's primary challenge to the Board's rule were sustained, an employer presumably could vitiate a collective-bargaining agreement at any time during the term of the agreement (within the statutory limitation period) on the basis of a good-faith doubt about the majority status of a union at the time that the agreement was formed. Petitioner's fallback position is that, even if the Board may impose some limit on the time when a good-faith doubt may be raised, the limit should be flexible enough to afford an employer a "reasonable period of time" in which to both assess the evidence of a union's loss of support and communicate its doubt to the Union. Pet. Br. 27. As explained above, in the absence of extraordinary circumstances, the Board's rule rationally bars all post-acceptance assertions of good-faith doubt by an employer based on pre-acceptance evidence known to the employer. See pp. 39-41, *supra*. We now show that, in any event, petitioner had a reasonable period of time within which to assess the evidence and communicate its asserted doubt to the Union.[15]

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[15] Neither the Board nor the court of appeals determined whether the evidence was sufficient to support a good-faith doubt about the Union's majority status at the time that it accepted petitioner's outstanding contract offer. Pet. App. 34a, 72a-73a, 80a n.81, 85a n.85. We do not concede its sufficiency here. Rather, our point is that petitioner became aware of that evidence, such as it was, enough in advance of the Union's acceptance to have a reasonable opportunity to assess its significance and to communicate its asserted doubt.

The record demonstrates that petitioner had received most, if not all, of the evidence upon which it based its asserted doubt by Monday, November 21, 1988, six days before the Union telegraphed its acceptance on Sunday, November 27, 1988. As the court of appeals observed, petitioner based its asserted doubt primarily on evidence that, of the 23 unit employees, (1) nine employees crossed the picket line; (2) 13 employees submitted written forms purporting to resign from the Union; and (3) 16 employees expressed dissatisfaction with the Union. Pet. App. 72a; accord Pet. Br. 5-6.[16] The first category of evidence relates to events on or before Friday, November 18, 1988, because that is the date on which the picket line was taken down. Pet. App. 11a, 36a n.47; see also Pet. Br. 30. As to the second category of evidence, 12 of the 13 written resignation forms were dated on or before Monday, November 21. J.A. 71a-77a. Finally, Ralph Auciello, petitioner's vice-president, testified that many of the employees who expressed dissatisfaction with the Union did so on or before Friday, November 18, the day on which the picket line came down and many employees came back to work. See J.A. 42a; see also J.A. 17a-40a, 57a, 60a.[17]

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[16] See also Respondent's [*i.e.*, petitioner's] C.A. Memorandum [regarding Board's supplemental decision and order] 3.

[17] Petitioner also relies (Pet. Br. 6) on evidence that, prior to the Union's acceptance of petitioner's contract offer, an unspecified number of employees who supported the Union told petitioner that they intended to accept permanent jobs elsewhere. Petitioner's witnesses testified that four employees had conveyed that information to petitioner by Friday, November 18, 1988. J.A. 25a-28a, 30a, 47a, 57a.

Petitioner does not dispute that it had received most or all of the evidence supporting its asserted doubt by Monday, November 21, 1988. Although petitioner protests that an employer cannot evaluate such information and communicate its doubt "within minutes or hours," it does not assert that it was required to act that quickly. Pet. Br. 27. Petitioner merely asserts that it had "far less than an adequate basis" for a good-faith doubt "as of [Thursday,] November 17, 1988, when it made its last offer to the Union." Pet. Br. 29. Petitioner elsewhere acknowledges, however, that even as of that date it believed that support for the Union "was on the downslide." *Id.* at 5. Otherwise, petitioner asserts only that it received much of the information regarding the Union's purported loss of support beginning on Friday, November 18, 1988, and over the ensuing three- or four-day period. *Id.* at 30.

The period between Monday, November 21, and Sunday, November 27, 1988, gave petitioner a reasonable opportunity to both evaluate the evidence and communicate its doubt concerning the Union's majority status before the Union accepted petitioner's contract offer on November 27. Indeed, petitioner accomplished both of those activities, by its account, within 24 hours after the Union's acceptance. See Pet. Br. 7; Pet. App. 11a, 35a; J.A. 42a, 66a.[18] Thus, even if, contrary to our submission in Point I, this

[18] Moreover, petitioner's vice-president, Ralph Auciello, testified that, toward the end of the strike (which the Union called off on November 27, 1988), and before the Union had accepted the contract offer, petitioner convened a meeting in order to prepare a list of employees who, petitioner believed, did not wish to be represented by the Union. Pet. App. 36a; see J.A. 48a-49a, 53a-54a, 55a-56a, 68a.

Court were to accept petitioner's contention (Pet. Br. 31) that an employer should have "a few days" to evaluate the evidence of a loss of majority support for the Union and to communicate its doubt about the Union's majority status, the Board's decision should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AUCIELLO IRON WORKS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions representing approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

A. The ultimate question raised by the complaint that gives rise to this case is whether petitioner breached its duty to bargain imposed by § 8(a)(5) of the National Labor Relations Act by withdrawing recognition and

ceasing to bargain with the union that had been certified by the National Labor Relations Board as the exclusive representative of petitioner's employees. Petitioner claims that it was privileged to so act because of a professed "good faith doubt" as to the Union's majority status.

The Court has expressly reserved decision whether the NLRA creates such a unilateral employer privilege. And, that question is now *sub judice* before the Board itself.

Against this background, and in the absence of a challenge by either party to the Board's "good faith doubt" rule, the starting point here is to *assume*, without deciding, that at certain times employers are privileged to terminate their duty to recognize and bargain with an exclusive representative based upon a good faith doubt of the union's majority status. On that assumption, the question becomes whether the NLRB erred in holding that this privilege may not be exercised after an employer's offer for a new collective bargaining agreement is accepted by the union. Pp. 4-7 *infra*.

B. By its terms, the NLRA creates an unqualified, and unlimited, obligation on an employer to bargain collectively with the representative "designated or selected . . . by the majority" of the employees in an appropriate bargaining unit. The Act also provides a direct route through which an employer who questions whether a union continues to enjoy majority support can secure an NLRB-conducted representation election to test employee desire for continued representation, as well as a procedure through which disaffected employees can initiate such an election. These are the only means set out in the Act through which the continuing employer duty to bargain may be terminated.

Furthermore, in the initial recognition setting, the NLRB has held, with the approval of this Court, that the NLRB representation election procedure is so superior a means of ascertaining employee sentiment that an employer may refuse to accord initial recognition to a union

which, on every objective basis, has demonstrated majority support but which has not obtained an NLRB certification. The considerations that led the Board to accord such primacy to the representation election procedure apply equally where questions arise as to an incumbent union's continuing majority status.

For all these reasons, the NLRB is, at the very least, free to require a representation election vote as the basis for a lawful employer termination of a duly-recognized union's status as the exclusive representative. The NLRB's current doctrine extending to employers the broader legal privilege to cease bargaining based upon a good faith doubt of majority employer support is, at most, a permissible exercise of the Board's administrative discretion. Pp. 7-12 *infra*.

C. The remaining question is whether the Board abused its discretion in holding that the privilege to withdraw recognition based upon a good faith doubt ends when a union accepts a contract offer.

If the only value expressed in the Act were assuring that at every moment in time an exclusive representative enjoys the support of the majority of the employees in the bargaining unit, there would be no need or justification for any temporal limits on when a union's majority status may be questioned. But the Act's ultimate aim is industrial peace, and towards that end the Board, with Congressional approval, has developed a set of rules which define time periods when a union's majority support is conclusively presumed and not subject to challenge, and other time periods when the presumption of continuing majority support is open to challenge.

The temporal limitation at issue here is of a piece with these rules. When an offer is accepted and a contract formed, the policies favoring industrial peace, stability and repose are at their strongest. Moreover, if employers were free to wait until negotiations conclude and an agreement reached before deciding whether to assert a

good faith doubt, such doubts could be asserted for tactical reasons wholly unrelated to protecting employee free choice.

The Board's rule leaves ample opportunity for an employer with a reasonable, good faith doubt of the union's continuing majority support to act on that doubt either by petitioning for a representation election or by withdrawing recognition. The Board's rule allows disaffected employees at least the same, ample opportunity to petition for an election. And the Board has expressly left open the door to testing employee sentiment even after a union accepts the employer's offer through means other than the assertion of a good faith doubt.

All that the Board has ruled here, in the interest of industrial stability and good faith negotiations, is that after a contract is formed the time for one avenue of testing union majority support—the avenue which is least accurate because focused on the reasonableness of employer perceptions of circumstantial evidence—has come to an end. That is a rational and defensible exercise of the Board's discretionary authority. Pp. 12-19 *infra*.

ARGUMENT

A. The ultimate question raised by the complaint that gives rise to this case is whether petitioner Auciello Iron Works ("the Company") breached its duty to bargain imposed by § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), as amended ("NLRA" or "the Act"). On its face, the answer to that question is self-evidently "yes."

The National Labor Relations Board ("NLRB" or "the Board"), acting pursuant to § 9 of the Act, conducted an NLRA representation election among the Company's employees in which a majority voted for representation by Shopmen's Local 501, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO ("the Union"). The NLRB, in accordance with the

Act, thereupon certified the Union as the exclusive bargaining representative of the Company's employees. As a result, under § 8(a)(5) of the Act, the Company became obligated to bargain collectively with the Union.

In the face of all this, on November 20, 1988, Auciello notified the Union that the Company "disavows any obligation to carry on further negotiations," and since that date the Company, as it states in its brief, has ceased to "recognize the Union as the exclusive bargaining representative of the employees," Resp. Br. at 7.

The Company's refusal to continue to recognize and bargain with the Union was not predicated on a second Board-conducted election, a resulting employee vote against union representation, and NLRB decertification of the Union as the representative of the Company's employees. Indeed Auciello never sought to invoke the NLRA's representation election procedures.

Nor has the Company sought to defend its action—as current Board law would allow—on the ground that the Union, *in fact*, no longer had the support of the majority of Auciello's employees at the time the Company withdrew recognition.[1]

Instead, as it does in this Court, the Company has sought to justify its refusal to continue to recognize the Union on the basis of a professed "good faith doubt" as to the Union's majority status. Under the good faith doubt rule, as reaffirmed by the Board in this case, "an employer need not show an actual numerical loss of majority support and may rely instead on circumstantial evidence to satisfy its burden of proof." 317 NLRB at 365 n.14; *see also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788 n.8 (1990) (same).

It is far from clear that the NLRA creates a unilateral employer privilege—based upon the employer's doubts

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[1] *Terrell Machine Co.*, 173 NLRB 1480 (1969), *enf'd*, 427 F.2d 1088 (4th Cir. 1970), *cert. denied*, 398 U.S. 929.

concerning the employees' desires—to terminate the continuing statutory duty to recognize and bargain with a union duly designated by the employees as their exclusive representative. In *Curtin Matheson,* 494 U.S. at 788 n.8, this Court specifically "declined to address that issue" as both parties in that case assumed the existence of such an employer privilege and it was challenged only by the AFL-CIO as *amicus curiae.* That question is now *sub judice* before the Board itself.[2]

Against this background, and in the absence of a challenge by either party to this proceeding to the Board's current "good faith doubt" rule, here as in *Curtin Matheson,* the starting point is to *assume,* without deciding, that at certain times employers are privileged to terminate their duty to recognize and bargain with an exclusive representative based upon the employer's good faith doubt of the union's majority support. On that assumption, the question becomes whether the NLRB erred in holding that this privilege may not be exercised in the period after an employer's offer for a new collective bargaining agreement is accepted by the union. As we proceed to show, that sub-rule represents a lawful exercise of the Board's authority.

Our analysis proceeds as follows. We first show that the "good faith doubt" rule is a creature of the NLRB's

[2] In *Lee Lumber and Building Material Corp.,* (NLRB) Case 13-CA-29377, the General Counsel of the NLRB has urged the Board to "adopt the following rule":

> No employer may lawfully withdraw recognition from a certified bargaining representative unless, at a time when the employer is still honoring its bargaining obligation, a majority of the employees reject union representation in a secret ballot election conducted at an appropriate time and on the basis of a 30% showing of interest. [General Counsel Br. at 20-21]

Lee Lumber was not called to this Court's attention in either the petition for *certiorari* or the brief in opposition. In light of the pendency of that case before the NLRB, the resolution of which could make the instant case purely academic, the Court may wish to reconsider its decision to grant a writ of *certiorari* here.

administrative discretion, rather than a creature of the Act itself. Nothing in the NLRA *requires* recognition of an employer privilege to terminate the duty to recognize and treat with a properly-designated exclusive representative based upon a good faith doubt as to the employees' continued support of the union. That privilege is, at most, the result of a permissible exercise of the Board's "authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 500-01 (1978).

Second, we show that assuming the NLRB is authorized to recognize such an employer privilege to withdraw recognition based upon a "good faith doubt," the Board's authority likewise encompasses discretion to place temporal limitations on when such a good faith doubt can justify a refusal to bargain, at least so long as the limitations are "rational and consistent with the Act," *Curtin Matheson,* 494 U.S. at 787. The sub-rule at issue here easily meets that test.

B. (1) Because the ultimate question in this case concerns the scope of an employer's duty to bargain under NLRA § 8(a)(5), analysis appropriately begins with the language of that section.

By its terms, § 8(a)(5) provides that

> It shall be an unfair labor practice for an employer—
>
> > to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a).

NLRA § 9(a), in turn, provides that

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such employees shall be the exclusive representative of the employees in such unit for the purposes of collective bargaining."

Taken together, then, these two provisions obligate employers to bargain with representatives "designated or selected . . . by the majority" of the employees in appropriate bargaining units.

The NLRA goes on to provide a direct route through which an employer who questions whether a union continues to enjoy majority support can petition for an NLRB-conducted representation election to test employee desire for continued representation, NLRA § 9(c)(1)(B), as well as a procedure through which disaffected employees can petition for such an election, NLRA § 9(c)(1)(A)(ii). In either event, the NLRB is instructed by § 9(c)(1) to "investigate such petition" and, if the Board finds that "a question of representation exists," the Board is to "direct an election by secret ballot." [3]

If, in such an election, a majority of the employees vote against representation by the incumbent union, the NLRB "shall certify the results"; doing so terminates the union's status as the employees' § 9(a) exclusive representative. And, since the § 8(a)(5) duty to bargain is "subject to § 9(a)," an NLRB certification that the union no longer enjoys majority support terminates the employer's bargaining duty as well.

This is the procedure Congress wrote into the Act—and the only procedure set out in terms in the Act—by which the continuing employer duty to recognize and bargain with a union "designated or selected" by the em-

[3] In this context, as in the context of petitions filed in initial recognition situations, the NLRB has developed a set of rules for determining whether a "question of representation" exists and an election should be held. Generally speaking, if a petition is filed by disaffected employees, the NLRB requires a 30% "showing of interest" (the same showing required in the initial recognition setting); if a petition is filed by an employer questioning an incumbent union's continuing majority support, the NLRB requires —in lieu of employee signatures—a demonstration of reason to doubt that the employees continue to desire union representation. *See United States Gypsum Co.*, 157 NLRB 652 (1966).

ployer's employees may be terminated. Nothing in this statutory scheme remotely suggests—let alone mandates—that, once a representative has been so "designated or selected," an employer is free to refuse to bargain based upon the employer's professed doubt as to whether a majority of the employees continue to support union representation.

The entire point of this procedure—indeed, the basic point of the Act—is to create a regime of "freedom of choice and majority rule in *employee* selection of representatives." *Garment Workers v. Labor Board*, 366 U.S. 731, 739 (1961) (emphasis added). Yet the good faith doubt rule, by focusing on the reasonableness of the *employer's* belief as to the *employees'* desires rather than on the *employees'* actual desires, permits majority employee sentiment to be frustrated where the employer's doubt is reasonable but wrong, *viz.*, where the employees in fact still desire union representation despite the employer's doubt. Thus, if anything, the good faith doubt rule runs *against* the grain of the statute rather than being compelled by it.

(2) There is also a tension between the good faith doubt rule and the decisions of the NLRB and of this Court concerning the method by which a union can obtain the status of exclusive representative.

There was a time when the Board was of the view that such means of establishing majority status as signed authorization cards, responses by employees to a poll, or participation by employees in a recognition strike are on a par with a representation election vote. Under this regime, as announced in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enf'd as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914, where an employer had no "bona fide doubt" as to such a showing of majority support by a union seeking recognition, the employer was obligated to recognize and bargain with the

union forthwith and could not insist upon a representation election "in order to gain time within which to undermine the union."

The "good faith doubt" rule as to when an employer lawfully may *withdraw* recognition of an incumbent union originated as a corollary of the *Joy Silk Mills* rule. In *Celanese Corp.*, 95 NLRB 664 (1951), the Board reasoned that good faith doubt should be the test not only for whether an employer's refusal to extend initial recognition to a union claiming majority support is lawful but also for whether an employer's refusal to continue to recognize such a union is lawful.[4]

In *Linden Lumber Division,* 190 NLRB 718, 721 (1971), *rev'd,* 487 F.2d 1099 (D.C. Cir. 1973), *rev'd,* 419 U.S. 301 (1974), the NLRB overturned *Joy Silk Mills* and held that employers may refuse to accord initial recognition to unions which, on every objective basis, have obtained and demonstrated majority support but which have *not* obtained an NLRB certification. The Board's decision adopting this rule was sustained by this Court on appeal. *Linden Lumber Division v. NLRB, supra.*

The *Linden Lumber* rule rests on a complex of considerations. In part it is an expression of the concern—expressed by this Court one year before the Board decided *Linden Lumber*—that such employee actions as participating or refusing to participate in a union-called recognition strike are not sufficiently reliable indicia of the employees' desires on the question of union representation as to form a basis for required union recognition. *NLRB*

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[4] *Celanese Corp.* overturned *United States Gypsum Co.*, 90 NLRB 964 (1950), in which the Board had held that "an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt by filing an employer petition" and that the employer is *not* free to act unilaterally in withdrawing recognition.

v. Gissel Packing Co., 395 U.S. 575, 604-09 (1969). Beyond that, the *Linden Lumber* rule reflects the understanding that a "representation election is a solemn . . . . occasion, conducted under safeguards to voluntary choice," *Brooks v. Labor Board,* 348 U.S. 96, 99 (1954); that other means of decision-making are "not comparable to the privacy and independence of the voting booth," *id.* at 99-100; and that, in consequence, the NLRA representation election system provides the surest means of avoiding decisions which are "the result of group pressures and not individual decisions," *Gissel,* 395 U.S. at 602.

The considerations that have led the Board to award such primacy to the representation election procedure apply with equal force where questions arise as to an incumbent union's continuing majority status. Evidence of anti-union sentiment expressed outside of the NLRA representation election system is no less ambiguous or unreliable than evidence of pro-union sentiment. The danger of "group pressure" is no less strong. And, the termination of a bargaining relationship is as weighty a matter as the initiation of such a relationship and thus calls for "a procedure no less solemn than that of the initial designation." *Brooks* 348 U.S. at 99. Thus, the Board's continuing willingness to entertain good faith doubt as the basis for allowing employers to withdraw recognition of a union is difficult to square with *Linden Lumber.*

Indeed, in the withdrawal of recognition context there is at least one additional consideration that militates against according any privilege to employer actions predicated on the employer's stated understanding of the employees' choice on union representation. As *Brooks* recognizes, an employer who questions a union's continuing majority status "[i]n effect . . . seeks to vindicate the rights of his employees to select their bargaining representative." 348 U.S. at 103. But the employer is a suspect champion of employee rights. The employer has obvious interests of his own that have nothing to do with

vindicating employee free choice and everything to do with vindicating the employer's desire to operate non-union.

(3) In sum, *Linden Lumber* teaches that the Board can properly conclude that in order to further the interests in employee free choice and self-determination the employer obligation to accord initial recognition to a union claiming majority support attaches only if the union establishes that majority through a Board-conducted representation election. Given *Linden Lumber*, and given the statutory scheme as outlined above, it follows that the Board, at the very least, is equally free to require a representation election vote as the basis for a lawful employer termination of a duly-recognized union's status as the exclusive representative. The NLRB's current doctrine extending to employers the broader legal privilege to cease bargaining based upon good faith doubt of majority employee support is, then, at most a permissible exercise of the Board's administrative discretion rather than the embodiment of any statutory mandate.

C. Against this background, the question posed here can be restated as follows. Having decided, in the exercise of its discretion, to privilege employers to terminate the duty to bargain with a properly-designated exclusive representative on the employer's good faith doubt of the union's majority support, did the Board abuse its discretion in refusing to extend that privilege to an employer who asserts such a doubt only *after* a union has accepted an outstanding proposal from the employer for a collective bargaining agreement. As we proceed to show, that limitation on the good faith doubt rule is entirely reasonable.

(1) NLRB certifications of a union as an exclusive representative following a Board-conducted representation election are not bounded by a stated expiration date. The Act contains no requirement that an exclusive representative reprove its majority support at defined intervals in order to maintain its status as the representative.

Rather, as we have seen, the Act provides procedures by which a union's majority status can be called into question at the initiative of either the employer or employees, and the Board has added further procedures of its own, including the good faith doubt rule.

If the only value expressed in the Act were to assure that at each and every moment in time an exclusive representative enjoyed the support of the majority of the employes in the bargaining unit, there would be no need—and no justification—for placing any temporal limits on when a union's majority status may be put into question. In such a uni-dimensional world, any moment would be an appropriate one for retesting support for a union.

But the world—and the Act—are more complicated than that. The "underlying purpose of this statute is industrial peace." *Brooks*, 348 U.S. at 103. And, as this Court recognized in *Brooks*, and many times since, that end in turn requires "stability in collective bargaining relationships." *Brooks*, 348 U.S. at 100.

It is in large part for this reason that Congress in 1947 added to the NLRA a provision which makes a union's certification unchallengeable for one year, even where the union, in fact, loses its majority support during the certification year. *See* NLRA § 9(c)(3). And it is for the same reason that the Board, with Congressional approval,[8] has developed a set of rules which define time periods when a union's majority support is conclusively presumed and not subject to challenge, and other time periods when the presumption of continuing majority support is open to challenge. As this Court explained in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38-39 (1987), in words on which the Board here relied, 317 NLRB at 367:

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[8] S. Rep. 105, 80th Cong. 1st Sess. at 27 (1947); H.R. Conf. Rep. 510, 80th Cong. 1st Sess. at 50 (1947).

> In essence, [the presumptions] enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. . . . The presumptions also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees. . . . The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace.

Plainly then, "as a matter of national labor policy", the Board may "limit the timing of employee[—and a *fortiori*, employer—]challenge to the[] certified bargaining representative's majority status." *NLRB v. Financial Institution Employees*, 475 U.S. 192, 208 (1986).

(2) That being so the dispute in this case reduces to whether the particular limit the Board constructed here—that employer good faith doubt claims asserted after an outstanding contract proposal is accepted and a binding contract is consumated will not be entertained—is a rational limit. For at least two reasons, it is.[6]

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[6] It bears emphasis that the NLRB did *not* purport to rule that acceptance of an offer marks the point at which the contract bar doctrine is triggered so as to preclude the Board from entertaining an employee decertification petition. *Cf.* 317 NLRB at 367 n.26 (distinguishing contract bar rule). The considerations that bear upon whether to grant the request of a group of employees for an election are not necessarily the same as the considerations implicated by an employer's assertion of a good faith doubt. The Board decision here thus does not speak to the contract bar issue.

Similarly, the NLRB went to pains to make clear that it was *not* deciding whether, after acceptance of an offer, an employer may withdraw recognition from the union upon proof of an actual loss of majority support. *See* 317 NLRB at 365-66 n.14, 375 n.74. There, too, the balance may be different than where, as here, the employer asserts nothing more than a doubt as to the majority sentiment.

First, as a general matter, during the term of a (three years or shorter) collective bargaining agreement a union's majority status is not subject to challenge; that is the essence of the contract bar doctrine. And, as the Board stated in its decision here, the general understanding in collective bargaining is that notwithstanding "a rejection or counterproposal," an offer still "remain[s] on the table and [is] capable of acceptance unless the offeror explicitly withdraws it or changed circumstances would lead both parties reasonably to believe that the offer was withdrawn." 317 NLRB at 369 n.34. Acceptance of such an offer thus marks the point at which a contract is formed.

At that point, the policies favoring industrial peace, stability and repose are at their strongest. The union and the employer have reached accord concerning the terms and conditions of employment which will govern the workplace for the term of the new agreement. Any strike activity is over and labor peace is likely to prevail for the term of the contract, given the dispute resolution mechanisms in collective bargaining agreements. The union is then in a position to turn its attention, and the attention of the employees it represents, from the disruptive process of reaching agreement to the healing process of restoring "industrial self-government" under the negotiated agreement. In these circumstances—as in several others in which this Court has refused to allow "an employer . . . presented with evidence that his employees have deserted their certified union . . . forthwith [to] refuse to bargain"—allowing employers "to rely on employees' rights in refusing to bargain . . . is not conducive to [industrial peace], it is inimical to it." *Brooks*, 348 U.S. at 103; *see also Financial Institution Employees*, 475 U.S. at 209; *Fall River Dyeing*, 482 U.S. at 50 n.16.

Second, allowing employers to wait until negotiations are concluded and an agreement reached to decide whether to assert a good faith doubt would invite the possibility that such doubts will be asserted for tactical reasons wholly unrelated to protecting employee free choice. The

employer in a case such as this one can avoid its supposed dilemma simply by withdrawing its contract offer should dissipating employee support for a strike give rise to a reasonable good faith doubt that the employees no longer desire union representation.[7] But allowing such an employer to leave the offer open, while at the same time preserving the option of avoiding the contract once accepted, would also open the door to a contract binding on the union but not on the employer. As the Board put it in its decision here:

> [I]t is inconsistent with the concept of good faith bargaining for the Board to adopt a rule that an employer may continue to bargain—and thus to treat the union as the representative of a majority of its employees—by leaving its contract offer on the table to await the outcome of negotiations before deciding whether to raise a doubt of the union's majority support based on grounds that it knew existed prior to the formation of the contract. [317 NLRB at 369].[8]

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[7] Employee support for the strike and employee support for union representation are, of course, two separate matters. *See Curtin Matheson*, 494 U.S. at 789 (an employee "may disagree with the purpose or strategy of the particular strike and refuse to support that strike, while still wanting that union's representation at the bargaining table").

[8] It is true as well that any rule permitting employer "self-help" in terminating bargaining relationships entails the possibility that an employer will assert a doubt as to union majority status because of the employer's antipathy to the union, rather than out of any concern for employee free choice. That possibility is especially strong in light of the fact that, by engaging in self-help, an employer can count on obtaining a several-year respite from bargaining. *Cf. Brooks*, 348 U.S. at 103. That truth, far from negating the rationality of the Board's present rule as a means of avoiding employer tactical use of the good faith doubt rule, simply casts further doubt on the good faith doubt rule itself. And, for the reasons explored in text, the dangers of a misuse of the good faith doubt rule would be greatly heightened if employers could wait until the end of negotiations to assert such doubts.

It bears emphasis that the limit stated by the Board here in no way threatens employee free choice or majority rule. The Board has left ample opportunity—during the "open period" prior to contract expiration and during any hiatus between contracts—for an employer with a reasonable, good faith doubt of the union's continuing majority support to act on that doubt either by petitioning for a representation election or by withdrawing recognition. The Board's rule, read most narrowly, allows disaffected employees that same ample opportunity to petition for an election. And, the Board has also left leeway for testing employee sentiment even after a union accepts the employer's offer, through means other than the assertion of a good faith doubt. All that the Board has ruled here, in the interest of industrial stability and good faith negotiaitons, is that after a contract is formed the time for one avenue of testing union majority support—the avenue which is least accurate because focused on the reasonableness of employer perceptions of circumstantial evidence—has come to an end.

One final consideration is worthy of note. In the nature of things, any "line drawing process, 'although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.'" *Burch v. Louisiana* 441 U.S. 130, 138 (1979). So here: had the employer withdrawn recognition of the Union one day earlier, the Board would have entertained the employer's assertion of a good faith doubt since under the Board's rule an employer can wait until the moment *before* an offer is accepted to assert such a doubt. But so long as the Board was justified in drawing a temporal line and chose a rational place of demarcation, its decision cannot be deemed to be an abuse of discretion merely because of the inherent degree of arbitrariness in any line.[9]

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[9] For this reason, among others, Auciello's suggestion that the statute requires that an employer have "at least a reasonable period of time to assess its position and to decide the appropriateness of

D. Against the foregoing, Auciello maintains that there *is* a statutory reason why the Board must allow employers to raise a post-contract good faith doubt of majority union support based on pre-contract facts: NLRA § 8(a)(2) as interpreted in *Garment Workers v. Labor Board, supra,* it is said, requires that result. Pet. Br. 36.

Garment Workers held (a) that an employer violates § 8(a)(2) by according initial recognition to, and entering into a collective bargaining agreement with, a union as an exclusive representative, where the employer did not verify the union's majority status and the union did not *in fact* represent a majority on the date recognition was accorded, and (b) that the validity of the recognition can be raised after the contract is consummated. 366 U.S. at 734-35; see 734 n.4 ("the union in fact had authority to represent either 70 employees out of a relevant total of 280, or 158 out of 368, depending upon the criteria used in determining employee eligibility"). Consistent with *Bernhard Altmann*, the Board has held that an employer who has voluntarily recognized a union in the first instance may refuse to bargain with that union

withdrawing recognition from the Union" (Pet. Br. at 31) is unpersuasive. Nothing in the Act or reason require the Board to square the already indefinite concept of good faith doubt by combining it with a "reasonable period of [assessment] time" which is, of course, an indefinite period of time, rather than a definite, ascertainable one.

Moreover, Auciello's entire "reasonable time" argument ignores the fact that the employer, in withdrawing recognition of an incumbent union, is not vindicating any statutory interest of its own, and that insofar as the employer seeks the opportunity to champion the employees' rights, the employer creates its own dilemma in a situation like the instant one by leaving on the table an offer which, by hypothesis, the employer was at liberty to withdraw. In effect, the Company seeks an extention of the privilege to assert a good faith doubt premised on the Company's own inattention to the bargaining process. No statutory provision or policy requires the Board to do so.

on the ground that the union lacked majority support at the time recognition was granted and may do so during periods—such as the initial recognition period—in which a presumption of majority support is not otherwise open to challenge. *See, e.g., Moisi & Son Trucking,* 197 NLRB 198 n.2 (1972).

But, as *Financial Institution Employees* and *Fall River Dyeing* confirm, *Garment Workers* does not go so far as to hold that a properly designated union's continuing majority support is always open to question or that it is always a violation of § 8(a)(2) for an employer to continue to deal with a properly designated union which thereafter loses majority support. To the contrary, *Garment Workers* leaves the Board free to adopt temporal limitations—like the contract bar rules—on when a properly designated union's majority status is subject to redetermination and to require employers to recognize and bargain with such unions during "closed" periods without regard to the union's actual level of employee support. *A fortiori,* the Board may, consistent with *Garment Workers,* impose the temporal limit at issue here on the employer privilege to refuse to bargain on the basis of an asserted good faith *doubt* of a properly designated union's continued majority support.

[10] *Chicago Tribune Co. v. NLRB,* 965 F.2d 244 (7th Cir. 1992), on which Auciello relies for its analysis of *Garment Workers,* is on its face fully consistent with our understanding of this Court's § 8(a)(2) jurisprudence. The Seventh Circuit's premises in *Chicago Tribune* were that the company refused to bargain on the basis "that the union no longer represented a majority of the workers", and that in fact "the union had lost the support of the workers." 965 F.2d at 248, 250. Thus, the Seventh Circuit did not view that case as one in which the employer had raised only a good faith doubt of majority support, but rather as one in which, as in *Bernhard Altmann,* the company raised—and proved—a union loss of majority support.

CONCLUSION

For the above stated reasons as well as those stated by the brief for the National Labor Relations Board the decision below should be affirmed.

Respectfully submitted,

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